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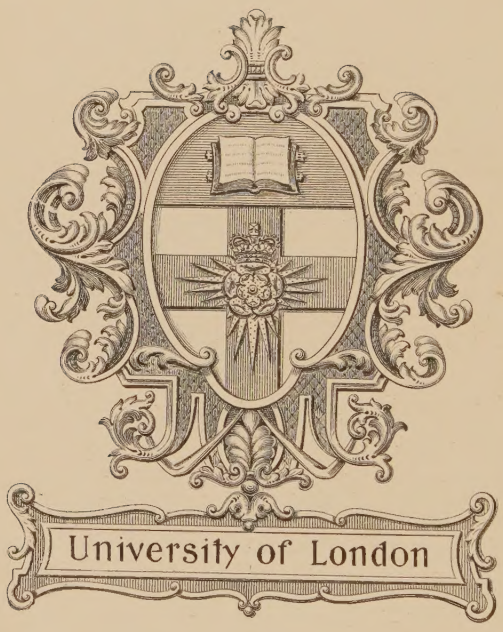

Edward C. Dunn
Lincoln's Inn
1867.

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THE

LAW REPORTS.

Equity Cases

BEFORE

THE MASTER OF THE ROLLS

AND THE

VICE-CHANCELLORS.

EDITED BY G. W. HEMMING, BARRISTER-AT-LAW.

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Equity Cases

BEFORE

THE MASTER OF THE ROLLS,

AND THE

VICE-CHANCELLORS.

In re ANGLO-GREEK STEAM COMPANY.

M. R.

1866

March 6, 7, 8, 12.

Company—Winding up—Misconduct of Directors—Companies Act, 1862, *s.* 79—*Practice—Costs.*

The misconduct of the directors and manager of a limited company, though it may be such as to render them liable if a suit were instituted against them by the shareholders, is not a ground on which the Court will consider it "just and equitable" to wind up the company under s. 79 of the *Companies Act*, 1862, where there is no evidence that their mismanagement has produced insolvency, or that the company is a mere bubble company, and where there is a reasonable prospect that, under proper management, it may be successfully carried on.

Where shareholders appear to resist a Petition for winding-up a company, they do so at their own costs; but where the Petition contains a personal charge against any director or any member of the company, the director or member so assailed is entitled to appear separately, and if the case against him fails, he is entitled to his costs.

THIS was a Petition by two shareholders of the *Anglo-Greek Steam Navigation & Trading Company, Limited*, for the winding-up of the company.

The material statements and allegations of the Petition were in substance as follows:—

That the company was registered and incorporated under the provisions of the *Companies Act*, 1862, on the 19th of July, 1865, and by the memorandum of association the capital was stated

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to be £750,000, divided into 30,000 shares of £25 each, and the objects of the company were stated to be the building or purchasing steam vessels for steam communication between *Great Britain, Greece, Egypt,* and other places; the purchasing or acquiring lands, or licenses, or concessions, which might be desirable for the interests of the company; the selling or disposing of the vessels or property of the company; the making arrangements with landowners or companies; the purchase and sale of goods and merchandise, and the import and export thereof, and the doing of other things incidental to the above objects.

That the company was promoted by *Stephanos Xenos* with the view and object solely, as the Petitioners alleged, of obtaining from the company a large sum of money for certain concessions alleged to have been obtained by him of the rights and goodwill of the *Greek & Oriental & the Levant & Black Sea Steam Navigation Company,* and a concession alleged to have been granted to him by the Greek Government granting to his vessels important privileges in Greek ports, which concessions the Petitioners stated they believed had no actual existence.

That with the view of carrying out the scheme, *S. Xenos* had made an agreement with the persons named (afterwards the directors of the company) that he should pay out of the money which he should receive from the company £3000 to Rear-Admiral *Elliot* (the chairman), £500 to Mr. *Fox,* £300 or £350 to Mr. *Lawson,* and other sums to the other directors for their assistance in carrying out his scheme; and that then *S. Xenos* and his co-promoters caused the articles of association to be prepared and registered.

That by clause 109 of the articles it was provided that £3000 a year should be set aside for the remuneration of the directors, and that, should the company pay a dividend of 25 per cent. in any year, a bonus of £10,000 should be divided among the directors.

That by clause 129 it was provided that *S. Xenos* should for three years be managing director of the company, and his remuneration should be £1200 a-year to be increased to £1500 for any year in which the company should pay a dividend of 10 per cent., and to £2000 for any year when the dividend should be 15 per cent.

M. R.
1866
In re
ANGLO-GREEK STEAM CO.

That by clause 130 it was provided that, inasmuch as *S. Xenos* had undertaken to sell to the company two concessions, namely, the goodwill of the *Greek & Oriental Steam Navigation Company*, and a concession of the Greek Government of privileges in the Greek ports, and had undertaken to pay the preliminary expenses, he should be paid the sum of £22,000, one-half in cash and one-half in shares, to be calculated at the rate of £16 paid.

That the Petitioners had applied for and been allotted shares in the company, as therein mentioned.

That the directors had purchased steam vessels at the price of £200,000, and that *S. Xenos* had received on that transaction a commission of £10,000.

That only 987 shares in the company had been allotted to the general public, and 1650 to Count *Metaxá*, who was formerly a director; that not more than £10,000 had been paid to the company in respect of shares, the whole of which sum had been taken by *S. Xenos* on account of his alleged agreement; and that a great number of shares had been allotted to *S. Xenos* and his friends on which no payment had been made to the company.

The Petition further contained charges of fictitious allotments of shares against *S. Xenos*, Admiral *Elliot*, *C. Bradberry*, *E. Mavrogordato*, and *A. Carnegie*, in respect of which no payment had been paid, and alleged that the directors and their nominees could at any meeting out-vote the *bonâ fide* shareholders.

That it was impracticable with the *bonâ fide* subscribed capital to carry out the business of the company, and the Petitioners believed it never was the intention of *S. Xenos* and his co-promoters to do so.

The Petitioners submitted that it was just and equitable that the company should be wound up, and prayed that it might be wound up under the provisions of the *Companies Act*, 1862.

The affidavits filed in support of the Petition purported to support the allegations in the Petition, and referred to other matters mentioned in the judgment, especially an arrangement with the *Railway Finance Company*, by which that company took 4000 shares, on which they were to be allowed 10 per cent. on the amount of their calls.

Affidavits were also filed on the part of the directors and the

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manager rebutting many of the charges, and *S. Xenos* and other witnesses were examined in Court on the hearing of the Petition. The effect of the evidence appears in his Lordship's judgment.

Mr. *Selwyn*, Q.C., Mr. *Roxburgh*, and Mr. *Graham Hastings*, for the Petitioners:—

The evidence shews that this is in fact a bubble company, and that it would be for the interests of the shareholders that it should be wound up under section 79 of the *Companies Act*, 1862. It is admitted that this can only be done under the 5th rule, which enables the Court to make a winding-up order "whenever the Court is of opinion that it would be just and equitable." These words, according to Lord *Cottenham's* decision on the similar section in the 11 & 12 Vict. c. 45, in *Spackman's Case* (1), must be interpreted in reference to matters *ejusdem generis* as those in the previous clauses. The character of the company as disclosed in the evidence is clearly within that rule. The engagement entered into with those who afterwards became directors of the company, is one that the Court would set aside; *Maxwell* v. *Port Tennant Steam Fuel and Coal Company* (2); and if a bill for that purpose could be sustained, it is a proper case for a winding-up order.

Mr. *Jessel*, Q.C., Mr. *Eddis*, and Mr. *Watkin Williams*, for the Company:—

The shareholders had full notice of the terms of the agreement with *S. Xenos*, and of the remuneration to be given to the directors by the articles of association, and cannot therefore now complain. Admitting that there were certain irregularities in the first inception of the undertaking, the evidence shews that the company is a *bonâ fide* concern, with ample resources, and with a fair prospect of success. Assuming that all the allegations in the Petition are true (which we deny), that is no ground for winding up the company. The remedy of the Petitioners, if it exists at all, is by a bill, and not by a Petition for a winding-up order.

Mr. *Druce*, for Admiral *Elliot*.

(1) 1 Mac. & G. 170. (2) 24 Beav. 495.

Mr. *Hemming*, for Mr. *Carnegie*.

Mr. *Swanston*, for Mr. *S. Xenos*:—

The charges in the Petition against the manager are not substantiated by evidence, and the Petition should be dismissed as against him with costs. In the case of *Re Marlborough Club Company* (1), it was held that shareholders had a right to oppose any Petition for winding up a company, and if successful they were entitled to their costs: *Shaw* v. *Forrest* (2).

Mr. *Southgate*, Q.C., and Mr. *Cotterell*, for the *Imperial Agency Company*, the *Railway Finance Company*, Mr. *Fox* and Mr. *Jenken*.

Mr. *Bagshawe*, for certain shipbuilders.

Mr. *Roberts*, for Count *Metaxa*, and other shareholders.

Mr. *Homersham Cox* and Mr. *Crouch*, for other parties.

Mr. *Selwyn*, in reply.

March 12. LORD ROMILLY, M.R.:—

This is an application by two shareholders to wind up this company under the 79th section of the *Companies Act*, 1862.

There are five different rules laid down in the section, which is the 79th, and the four previous rules are these:—"Whenever the company has passed a special resolution requiring the company to be wound up by the Court; Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year; Whenever the members are reduced in number to less than seven; Whenever the company is unable to pay its debts"; and then the fifth is, "Whenever the Court is of opinion that it is just and equitable that the company should be wound up." In that case Lord *Cottenham* laid down, and I have followed him, and all the other Courts, I think, have

2 Ch 749

(1) Law Rep. 1 Eq. 216. (2) 20 Beav. 249.

12 Jur N.S. 45.

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done the same, that these words are to be considered as referring to matters *ejusdem generis* with the four subject-matters previously stated in the four previous rules; at the same time I am of opinion that this principle would be satisfied if it were established that the company never had a proper foundation, and that it was a mere fraud, what is commonly called a "bubble company." In that case the Court would consider that it came within the fifth rule.

In this case, as none of the four first rules apply, it becomes necessary to examine into the constitution of the company, to see whether anything can be made out in respect of the fifth rule, which would induce the Court to wind it up. As far as the evidence allows me to judge, coupled with my very limited knowledge of the subject itself, I should judge favourably of the plan of this association, provided it were carried on in a *bonâ fide* manner, and not with money got together by large discounts and mulcted by heavy commissions.

The concessions, as far as I am able to judge from the evidence, appear to me to be valuable. The support of the Greek houses seems to me to be secured. The first voyages appear to have produced fair and reasonable profits, and to have been prosperous, and to promise future prosperity; and the whole association might, I think, reasonably expect fair and reasonable profits if the assets of the company are not wasted by too heavy remunerations to the officers and payments for loans, or *quasi* loans, and in the mode of obtaining shareholders.

Having come to that conclusion, if this matter had rested there, the task I should have had to perform would have been very simple. I should simply have dismissed the Petition; but the Petition goes on to attack several of the members of the concern, and the directors themselves personally. If it had been simply denied by the company, and if the directors had not personally appeared, I should have simply dismissed the Petition as not having made out a case for the winding-up of the company. For though the misconduct of directors may be a reason why the shareholders should have relief against them, it is not a reason for winding up the company. But the directors and certain shareholders have appeared personally, and the affidavits and the cross-examinations have disclosed matters of considerable importance to the share-

holders, which much concern the interests of this association, and which involve the question arising upon the fifth rule, which I have read.

It is the duty of all directors to be not only ready at all times to explain everything to the shareholders, but to see that there is nothing that savours of underhand dealing between them, nor any transaction by which profits can be derived by them or any one of them which is not openly known to and acquiesced in by all the shareholders. Every shareholder is, in my opinion, bound to know the articles of association, and he cannot complain of anything disclosed by them, which if he does not know he might know, and ought to know.

In this case it is provided by section 129 and 130 of the articles of association as follows:—[His Lordship then stated the provisions of these articles, and continued.] I see no reason to complain of those clauses. They may be valuable concessions, and I think the evidence has established that both concessions were obtained by *S. Xenos*' exertions; and assuming, as I think the fact to be, that *S. Xenos* possessed the requisite knowledge, and that he gave the whole of his time to the concern, the remuneration does not appear to me to be excessive; and, above all, it is openly told to all the shareholders. Then, by another clause, remuneration to the directors is given, in addition to this managing director, amounting to £3000 a-year between them, with a bonus of £10,000 to be divided amongst the directors if the company pays a dividend of 25 per cent. in any year. This is all fair and open, and if the public subscribe to companies conducted by persons receiving this remuneration they cannot afterwards complain. They knew at the time they did so that £4200 was to be deducted out of the net profits before any dividend was to be paid.

But the evidence before me discloses a further state of things, which was not disclosed by the articles of association, and which had not been made previously public. In the first place, Admiral *Elliot* was to receive £3000 from the promoter; and he has actually received it in paid-up shares given to him by *S. Xenos* as the reward of his assistance in getting up the company, and for lending his name and his services. He also received £750 in cash

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from *S. Xenos*, which is said to have been for money spent and for the time he bestowed in the service of the company and in its formation, and for the knowledge he possesses of nautical matters, which made his services very valuable; and all this is beyond his remuneration for the duties of his office. It may have been a very proper payment in itself; but the evil is this, that it is not divulged to the public, who are asked to become shareholders. In truth, the shareholders were not injured by *S. Xenos* giving to Admiral *Elliot* £3000 of his own money or out of his own paid-up shares, rather than to any stranger, which he might have done; that is, they were not injured by the payment of the money; but he having the care and superintendence of the interests of the association, it becomes a serious and different matter. Again, £300 was paid to Mr. *Saxon*, another director in the company, and it was also paid by *S. Xenos;* but if *S. Xenos* could afford to pay those sums out of moneys paid to him by the company for the concessions which he had made over to them, then it was the company and not the directors who ought to have obtained the benefit. As between shareholders, these transactions would have been nothing; but as between directors, it becomes everything. The public has a right to expect that the directors who have lent their names to an institution of this character have carefully considered the chances of success of the scheme which has been announced to the public, and that they have, after much consideration, sanctioned it as favourable. The public rely on their names. They rely on the knowledge they possess, and the judgment and capacity of the gentlemen who have become directors; but where the directors obtain a large pecuniary advantage out of the concern not mentioned to the public, it is impossible for the public to distinguish between the motives which have induced those gentlemen to support this scheme, or to judge how far they depend upon a belief in its chances of success.

Again, as regards *S. Xenos*, another of the directors, and one of the most important, the evidence discloses a matter which the Court cannot look upon leniently. The association was peculiarly a project which required an amount of ready money to be employed for its assistance. Many steamers were required, and those, of course,

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must be paid for, in order to establish the association. Contracts for five or six steamers were entered into, to the amount of £100,000, which were entered into, as far as I can judge, very properly, with certain shipbuilders, by *S. Xenos'* brother, *Aristides Xenos;* but a part of the arrangement was, that he was to have a profit of 10 per cent. upon the transaction, that he was to receive £10,000 from the builders in consideration of their being employed to build steamers to the amount of £100,000; and *S. Xenos* admits that he was to share in that profit. That is a matter which cannot be supported upon any ground. It is unnecessary for me to refer to this subject more in detail. I have often had occasion to lay down the principle that governs cases of this description. In the case of *York & North Midland Railway Company* v. *Hudson* (1), I did not allow Mr. *Hudson,* though one of the directors, and acting for himself, to obtain profits by re-selling to the company iron which he had bought at the market price at the time, and which had afterwards risen in value. Upon all these occasions the directors are bound to do the best thing they can for the company, for the persons who are their *cestuis que trust.* No director can make a profit out of the transactions of the company, except such a profit as is acknowledged and admitted, and established by the rules of the association.

To conduct this company successfully, large calls ought to have been made at the beginning, in order to enable them to conduct it with any reasonable chance of success; but how was this money obtained? *The Railway Finance Company* took 4000 shares; but they took them upon these terms, that they were to be allowed a profit of 10 per cent. upon the amount of the calls; in other words, they were to pay nine-tenths for what every other shareholder was to pay ten-tenths; and they were to receive the same profits as every other shareholder. This 10 per cent. was paid in advance, and all the calls were to be made as if they had been paid up in full; and, accordingly, upon payment of £10,000 by the *Railway Finance Company* they were to be treated as having paid £20,000—that is to say, having paid up in full the first call which was to be made in advance. In addition to this, a commission of £2000 was given to the *Imperial Finance Company* for nego-

(1) 16 Beav. 485.

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tiating the taking of the shares by the *Railway Finance Company*.

I repeat that in my opinion there seems a fair prospect of success under a proper and economical management; but if this system is to be pursued, it requires but very little prophetic power to foresee that this company will soon appear before this Court in a condition in which the order I have already stated I now refuse to make will become inevitable.

I have referred to these circumstances only for the purpose of considering whether, having reference to the fifth rule of the 79th section, this company is of such a character that the Court ought to wind it up. All this is urged as a ground for an immediate order for winding up the company. I do not so consider it. I am of opinion that the misconduct of the directors and manager towards the shareholders may be the subject of a suit, but it is not a reason for winding up the company, until that mismanagement has produced insolvency, which is very far from being the case now. There are no debts, except those which are inevitable. Assuming that a bill would lie to correct the matters which I have mentioned, and assuming that the directors would be compelled to restore the moneys they have received for the benefit of the company, and that the shares of the *Railway Finance Company* ought to be cancelled, or some alteration made in that respect, still I am of opinion that that is a matter for a suit, and not for a Petition for winding up. I see much that may be proper to reform; but I see nothing which would render it, to use the words of the Act, "just and equitable," in the present state of affairs, that this company should be wound up; nor should I, as indeed I stated originally, have gone into this matter so much in detail but for the appearance of the several Respondents to meet the charges made against them in the Petition. The Petition must, therefore, be dismissed as regards the company, and must be dismissed with costs.

But I have now to consider the costs of the various persons who have appeared as Respondents upon this Petition, some of the facts relating to whom I have already referred to.

The rule I have always followed has been this: if shareholders appear to resist a Petition for winding up a company, they do so

at their own cost; if not, the expense of dealing with matters of this kind would be excessive, for if one might appear any number might appear, and it is impossible to lay down the limit; one hundred different shareholders might appear to resist the winding up; and if the Court thought that it ought not to be wound up, then they would all be entitled to their costs of appearance; but if a personal charge is made against any of the directors, or against any member of the company, in the Petition, then the director or the member of the company so assailed is entitled to appear separately; and if the case fails, the Petitioner must pay his costs. That is the general rule which I have made and have always followed.

I will now consider the cases of the Respondents *seriatim*. The shareholders for whom Mr. *Roberts* appears, who support the Petition, among whom is Count *Metaxa*, who appears to have been principally concerned in getting up this Petition, do not ask for costs, and could not, if they did, obtain them. The others appear to oppose the Petition. Mr. *Carnegie*, against whom a charge is made, not of a serious nature, but sufficient to justify him in appearing to contradict it, and which he has established to be wholly without foundation, is entitled to his costs of this Petition, but his costs should be confined to his defence to this charge.

Admiral *Elliot* is the next, and the charges against him are these: [His Lordship then read the allegation.] I am of opinion that the charge is disproved; that is, it was not a mere fraudulent scheme, and the concessions had an actual existence. If it had rested there I should certainly have given Admiral *Elliot* his costs, but for the contract for the payment of £3000, which was not known to the shareholders, and the further payment of £750. I regret to say that I cannot in such a case, where there has not been perfect openness with the shareholders upon a transaction of so much importance, and certainly requiring very properly to be inquired into, give costs. It is also to be observed that no access was given to the Petitioners to any of the books of the company by which they seek to support these charges. It is true they have said this discovery was only sought for the purpose of making charges and of endeavouring to support this Petition,

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which was very likely the case; but there ought to be nothing to be concealed, nothing in such books which cannot be made public, nothing that can fairly be objected to by the shareholders. Concealment always does harm, and if the Petitioners had had the whole of the books and papers they might possibly not have filed this Petition. But whether this is so or not, if the charges made by them had been retained in the Petition after full information from the company, that would have been a much more serious matter, and would have been visited by me much more severely. If the allegation that the concessions had no actual existence, and that this was a scheme to put money into the pocket of Mr. *S. Xenos*, had been omitted, the rest of the fifth paragraph would have been a sufficient charge, and therefore I can give Admiral *Elliot* no costs of this Petition.

Against the *Railway Finance Company*, the *Imperial Agency Company*, and Mr. *Jenken*, there is no charge whatever made by the Petition, and I think, therefore, they were not justified in appearing. It is true, in one of the affidavits a charge is made respecting the *Railway Finance Company*, to the effect that it was a bubble company, which in my opinion has been wholly disproved as far as there is evidence before me, but they appeared before this charge was made, and they only knew of it because they became Respondents to the Petition. This would also throw upon me another and collateral issue which it would be impossible for me to investigate, and one which is wholly immaterial as regards the order to be made upon this Petition, as far as relates to the winding up of the *Anglo-Greek Company*.

The charge against Mr. *Fox* is, that he received £500 from Mr. *S. Xenos* for supporting his scheme, which is disproved, and in my opinion he must have his costs, for this is a charge of a serious character, which he was entitled to answer. As, however, he has appeared in company with three others, I cannot give him more than his share of the costs. I do not mean to give him the whole costs.

The charge against Mr. *Mavrogordato* is that he had 900 shares, each credited with £2 10s. per share paid thereon, when in fact he was the nominee of *S. Xenos*, and had made no payment whatever on those shares. This turns out to be correct literally, but un-

substantial in point of fact. It is true that nothing has been paid on those shares, but that is explained by the fact that the company were indebted to him as their agent, they having employed him for various purposes in the *Levant*, for which they would have had to pay him. I do not think that would entitle him to a separate appearance, as his defence could have been involved in that of the company, whose agent he was. The case of Mr. *Carnegie* is different, because not only was he not one of the directors of the company or connected with it as agent in any way, except as a shareholder, but there was not a semblance of truth in his case, which is not the case with respect to *Mavrogordato*, and I am of opinion I can give no costs to Mr. *Mavrogordato*.

No charge whatever is made by the Petitioners against the builders of the boats, and they appear to support the company *simpliciter*, therefore they must pay their own costs.

With respect to *S. Xenos*, the charge is unquestionably of a very serious nature. I am of opinion that the main charge is distinctly disproved; that he had concessions from the Greek Government giving privileges in Greek ports, and also a concession from the Greek merchants.

This is so serious and direct a charge of fraud, that I hesitated a very long time whether I should not allow him his costs of meeting it, but then the facts which have been established of the agreement with the shipbuilders, the payments to Admiral *Elliot* and Mr. *Saxon*, none of which facts were disclosed to the public, and the withholding of all information from the Petitioners, has compelled me to say that to entitle any director, and above all a managing director, to his costs in such a case, he must appear unsullied by any transaction he has entered into, and should be able to shew that he obtained no benefit at all from those matters except that which has been openly proclaimed. I cannot, therefore, with any propriety, give costs to *S. Xenos*.

I wish I could now part with this case, which is to me a very painful one, and with which I have little further to do, except to express dissatisfaction with almost everybody, and with all the proceedings from beginning to end; but I must still make some observations for the purpose of expressing my dissatisfaction at the mode in which the Petition has been got up, and in which it has

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been launched in the first instance, and my regret that a gentleman in the position of the Petitioner should have thought he had sufficiently discharged his duty by making an affidavit to his belief of the truth of the contents of the Petition which he had never read, which he took entirely upon trust, the statements in which he had neither read himself, nor had read to him. In truth, he seems to have acted for another throughout the whole of this matter, and to have been very indifferent upon the subject, and to have treated it as an ordinary matter, in which he might do whatever he was told. In my opinion that is not justifiable, and no care can be too great in a matter where an oath is to be taken as to belief in the truth of statements contained in a document, without which it would not be entertained by the Court at all—no care can be too great to ascertain the truth of what he has so sworn. I have no doubt he was ready and willing to believe everything that was told him; still, in my opinion he ought to have ascertained it carefully and fully; and in my opinion, also, the solicitor who appeared for him ought not to have allowed his client to make such an affidavit without having first taken care that his client well knew all that was stated in the Petition, and why he was called on to say he believed the truth of the facts narrated to him by the solicitor, of which the client was not himself personally aware.

The final result of the whole is, that the Petition is dismissed with costs against the company, Mr. *Carnegie*, and Mr. *Fox*, but without costs as regards all the other Respondents.

Solicitors for the Petitioners: Messrs. *Lewis & Lewis.*

Solicitors for the Respondents: Messrs. *Hancock, Sharp, & Hales;* Messrs. *Meyrick, Gedge, & Loaden;* Messrs. *West & King;* Messrs. *Johnston, Farquhar, & Leech;* Messrs. *Oliverson & Co.;* Mr. *J. J. Croft.*

In re HUMBER IRONWORKS COMPANY.

M. R.

1866

March 10, 13.

Practice—Company—Winding-up—Costs—Companies Act, 1862.

Where a Petition to wind up a company is dismissed, the Petitioner will, as a general rule, be ordered to pay the costs of the company opposing the Petition, and of every person against whom a personal charge is made by the Petition and who appears and disproves such charge and is otherwise free from blame; but no other person appearing either to support or oppose the Petition will be allowed any costs.

Where the winding-up order is made, the Petitioner and the company will have their costs out of the estate, and shareholders and creditors, who appear to support the Petition, will have out of the estate one set of costs between them.

THIS was a Petition for the winding-up of the *Humber Iron Works & Ship Building Company, Limited*, a company incorporated and registered under the *Companies Act*, 1862. At an extraordinary general meeting of the shareholders, on the 3rd of February, 1866, it was resolved that the company should be wound up voluntarily, that a Mr. *Child* should be appointed liquidator, and be paid at the rate of £3 per cent. on all realized assets (exclusive of new calls), and £1000 for office expenses, the total payment not to exceed £3000, and that five shareholders, named in the resolution, should be appointed a committee, for the purpose of supervision. These resolutions were confirmed at an extraordinary general meeting on the 20th of February.

On the 27th of February, this Petition was presented by Messrs. *Latham & Smith*, simple contract creditors of the company to the amount of £106 16*s.* 11*d.*, praying that the company might be wound up by, or under the supervision of, the Court, and that *Child* might be appointed or continued liquidator. The Petitioners employed the same solicitors as the company.

The Petition having been advertised, *James Whitham*, a judgment creditor of the company to the amount of over £2000, presented another Petition, in which he alleged that *Latham & Smith's* Petition had been presented at the instance of the com-

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pany and *Child*, in order to retain in their hands the management and control of the winding up, and that he and the majority of the creditors objected to the voluntary winding up and the appointment of *Child* and the powers and emoluments given to him by the resolution, and prayed for the compulsory winding up of the company. This Petition had been advertised and was answered for the 17th of March.

Mr. *Selwyn*, Q.C., and Mr. *Marten*, for *Latham & Smith*, now asked for the usual order for a compulsory winding up.

Mr. *Baggallay*, Q.C., and Mr. *Druce*, for the Company, did not oppose.

Mr. *Roxburgh*, for *Whitham*, asked leave to withdraw his Petition, and submitted that he ought to be allowed out of the estate the costs of presenting and advertising his Petition, and the costs of advertising its withdrawal, which was necessary in consequence of the decision in *Re Marlborough Club Company* (1), on the ground that the other Petition, having been presented by persons who employed the company's solicitors, and praying for the continuation of the voluntary winding up and the appointment of *Child*, was evidently collusive and was virtually the Petition of the company. He also asked for his costs of appearing on this Petition to oppose the continuation of the voluntary winding up and the appointment of *Child*.

Mr. *Southgate*, Q.C., Mr. *Jessel*, Q.C., Mr. *F. Harrison*, and Mr. *Bagshawe*, for three different creditors of large amount who appeared to insist on a compulsory winding up and to oppose the appointment of *Child*, asked for their costs.

Lord Romilly, M.R.:—

The only order I shall make at present is the usual winding-up order. I will consider the question of costs. I think that under the circumstances, Mr. *Whitham* is entitled to the costs of his Petition and the affidavit in support of it, and the costs of adver-

(1) Law Rep. 1 Eq. 216.

tising its withdrawal; but as to the others, I do not think I ought to give costs to an indefinite number of persons.

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March 13. LORD ROMILLY, M.R.:—

I have considered this case with respect to the costs as carefully as I can. The rule which I shall adopt, and which I mean to express upon the present occasion, is that which I shall endeavour to follow generally in these matters. The costs of the Petition by Mr. *Whitham* I do not consider to come within the ordinary rule. I stated yesterday, that I thought he was entitled to the costs of his Petition, and I retain that opinion now: I think that, under the peculiar circumstances under which this Petition was presented, and it appearing to be really a Petition by the company itself, and asking for a continuation of the liquidator, he was justified in presenting his Petition. It appears to me to be a proper Petition, and therefore, I shall allow him his costs out of the estate, which will include the costs of advertising the Petition and its withdrawal.

The rule that I shall adopt with respect to the other costs, as the proper rule, is this. There are two cases to be considered; one, where the Court refuses to make the order prayed for, and the other where the Court makes the order prayed for. In my opinion, the rules as to costs are separate and distinct in those two cases. I will take, first, the case where the Court refuses to make the order. In that case, as a general rule (of course there may be exceptions to it), the company opposing the order will have their costs from the Petitioner; of course any shareholders, or creditors, or any other persons who appear and support the Petition, will not have their costs. To parties who appear to oppose the Petition I shall give no costs, with this single exception, that where a personal charge is made against any one of the shareholders, or directors, of such a character as, in my opinion, justifies him in appearing to oppose the Petition; in that case, if he is perfectly free from blame in the matter, and the charge against him is disproved, I shall give him his costs, to be paid personally by the

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Petitioner. That is how I shall deal with the costs where the Court dismisses the Petition.

Where the Court grants the prayer of the Petition, of course it will give no costs to persons who appear to oppose the Petition; because in that case the Court makes an order against them: it gives the costs of the Petitioner and those of the company out of the estate; and if a number of persons, whether shareholders or creditors, appear to ask for an order to wind up the company, in that case I am of opinion that the Court ought to allow, out of the estate, one set of costs amongst them all, and they must arrange between themselves in what manner they are entitled to such costs. I will not allow a series of costs to them.

I have written down the rule as to the costs of persons other than the Petitioner and the company thus:—Where the Court refuses to make any order, the shareholders supporting the Petition get no costs, and the shareholders resisting the Petition get no costs, unless personally assailed. Where the Court makes the order to wind up, and the shareholders and creditors, together or separately, appear to support the Petition, one set of costs is to be given amongst them, and only one. In this case there are four or five parties who appear for that purpose, and they must arrange between them how the costs are to be distributed. I shall allow only one set of costs between them.

Solicitors for the Petitioners and the Company: Messrs. *Thomas & Hollams.*

Solicitors for the Creditors: Messrs. *Few & Co.*; Messrs. *Harrison, Beale, & Harrison;* Messrs. *Flux & Argles.*

BOUCK *v.* BOUCK.

SC 35 Beav 643.

Pleading—Demurrer—Multifariousness.

M. R.
1866
April 18.

A Bill filed by one of the next of kin of an intestate against his administrator for the administration of the estate, and also seeking, as against other Defendants, to set aside a deed whereby the Plaintiff had assigned a portion of his interest in the estate for their benefit:—

Held, on demurrer by the administrator, to be multifarious.

14 Eq 58

DEMURRER.

In this case the Plaintiff, and one of the Defendants, *J. A. Bouck*, were the sole next of kin of *J. T. Bouck*, who died intestate. On his death, the Defendant, *J. A. Bouck*, took out administration and possessed himself of his personal estate, and the bill charged that it ought to be administered under the direction of the Court, and the residue divided.

The bill also alleged that by an indenture expressed to be made between the Plaintiff of the first part, the Defendant, *Hannah Bouck*, who alleged that she was married to the intestate, of the second part, and two other Defendants of the third part, the Plaintiff had assigned his share of the residuary estate, or so much thereof as would realize £8000, to the two last-named Defendants, upon trust for *H. Bouck* for her life, with remainder to the Plaintiff for his life with remainders over; that notice of the indenture was served on the Defendant, *J. A. Bouck*, who refused to pay the Plaintiff his share of the estate; and that the deed was executed by the Plaintiff without proper advice, and without consideration, and ought to be declared void or modified by the reduction of the amount of the property comprised therein.

The bill prayed, that the personal estate of the intestate might be administered and the residue divided; that the alleged indenture, so far as it affected the Plaintiff's right to receive his share of the residue, might be declared void, or modified by the reduction of the amount alleged to be subject to its trusts; and that inquiries might be directed and accounts taken.

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The Defendant, *J. A. Bouck,* filed a demurrer for multifariousness.

Mr. *Baggallay,* Q.C., and Mr. *Parke,* for the demurring Defendant:—

The Plaintiff seeks to join a collateral matter with a suit for the administration of the estate. This cannot be done. In *Salvidge* v. *Hyde* (1), a bill for an account of a testator's estate, and also to set aside sales made by the executor and trustee, was held to be multifarious. So in *Mole* v. *Smith* (2), a bill for specific performance by a vendor, praying against third persons who claimed an interest in the estate that they might join in the conveyance to the purchaser, was held to be multifarious. In *Whaley* v. *Dawson* (3), a demurrer to a bill against several persons for several and distinct matters was allowed. In the case of *Jerdein* v. *Bright* (4), where a Plaintiff filed a bill for the administration of the trusts of a creditor's deed, and for relief against a purchase by one of the Defendants from the trustee, it was held by Vice-Chancellor *Wood* that the bill was multifarious for joining a prayer for accounts with that for relief against the purchaser. The same principle applies here, and therefore the Plaintiff's bill is demurrable for multifariousness.

Mr. *Graham Hastings,* for the Plaintiff:—

The demurrer in this case should not be allowed. With regard to *Jerdein* v. *Bright* (4), Vice-Chancellor *Wood* appears, from a subsequent case before His Honour of *Bent* v. *Yardley* (5), to have felt some doubt as to that decision. *Bent* v. *Yardley* was a suit for the administration of the trusts of a settlement, and for the administration of the trusts of a will made by one of the persons interested under the settlement; the bill also prayed that a lease granted by the trustees of the settlement might be set aside. Two demurrers were put in on the ground of multifariousness, one of which was allowed; but with regard to the other, put in by the lessee, His

(1) Jac. 151.
(2) Ibid. 494.
(3) 2 Sch. & Lef. 367.
(4) 2 J. & H. 325.
(5) 2 H. & M. 602.

Honour was of opinion, though it was not necessary to decide the point, that the bill was not multifarious so far as it sought to administer the trusts of the settlement. That was a similar case to *Jerdein* v. *Bright* (1), hence it would appear that His Honour must have doubted the correctness of his former decision. In the present case the demurring Defendant is interested in knowing whether the deed which is impeached by the bill is good or not; that is a necessary part of the inquiry, and the Defendant cannot say that he is not a proper party to the suit. In the cases cited the demurrer was put in by the person whose deed was sought to be set aside. The doctrine of the Court with regard to multifariousness is stated by Lord *Cottenham* in *Campbell* v. *Mackay* (2), referring to *Salvidge* v. *Hyde* (3). In *Addison* v. *Walker* (4), which was a bill for the administration of the assets of a settlor, and seeking to impeach a prior security claimed over the settlor's property by one of the trustees who was a Defendant to the suit, a demurrer by the Defendant trustee for multifariousness was overruled. In *Parr* v. *Attorney-General* (5), Lord *Cottenham* observed (6), "Nothing can be more difficult than to lay down rules as to multifariousness . . . many matters are to be considered before a rule can be laid down applicable to all cases." Here the demurring Defendant is a person interested in every part of the case, as it is material that he should know to whom he is to pay the Plaintiff's share in the fund, a portion of which is claimed under the deed which the bill seeks to impeach. The Plaintiff has a clear right both to have the estate administered and to have an inquiry respecting the deed, and both can be done by one bill.

LORD ROMILLY, M.R.:—

I think the objection is one of substance. The distinction is very obvious between this case and those cases where there is an ascertained fund in the hands of a trustee, and there are three or four persons claiming it. There, unquestionably, a person may file a Bill against the trustee for the purpose of obtaining payment of

(1) 2 J. & H. 325.
(2) 1 My. & Cr. 603, 618.
(3) Jac. 151.
(4) 4 Y. & C. Ex. 442.
(5) 8 Cl. & F. 409.
(6) Ibid. 433.

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that ascertained fund, making all the other persons claiming parties to the suit; and the trustee may, in order to get rid of the matter, say, "Allow me my costs, and let me pay the money into Court." Or the trustees might file a Bill of interpleader and so dispose of the whole matter. But if you file a Bill for the purpose of taking a regular administration of a testator's estate, or of an intestate's estate, and you mix that up with the question whether one person has conveyed his share of that estate to another, and whether that deed ought to be set aside, then a different question arises, and the trustees cannot dispose of the fund. The accounts must be tied up, until it is ascertained who is entitled to ask for the account. Then, are all the costs to be paid out of the testator's or intestate's estate? And are the other persons to be delayed until these are paid? If that be so, you may have each of four or five of the next of kin disputing whether or not he had assigned his share, and mixing the question up with the taking of the account of the estate, to the prejudice of other next of kin who might wish to have their shares ascertained and paid without delay. I do not think that you are entitled to require that the legal personal representative shall be present at the discussion whether this deed ought to be set aside.

The authorities which Mr. *Baggallay* cited are sufficient. Indeed, the case of *Jerdein* v. *Bright* (1) goes further than the present. It may be a question whether that does not go to the very verge.

The demurrer must be allowed, with liberty to amend, and the Plaintiff must pay the costs.

Solicitors for the Plaintiff: Messrs. *Deane, Chubb, & Saunders.*
Solicitors for the Defendant: Messrs. *Wright & Venn.*

(1) 2 J. & H. 325.

In re BLITHMAN.

M. R.
1865-6
Dec. 16;
Jan. 17,
1866

Insolvency in South Australia—Assignees—Personalty in England—Domicil—S. Australian Stat. 23 & 24 *Vict. No.* 16.

A person having a vested reversionary interest in a trust fund of personal property in *England*, became insolvent in *South Australia*. The property fell into possession, but before it was paid over the insolvent died:—

Held, that if his domicil was Australian, the assignees under the insolvency were entitled to payment of the fund, but that if it was English, the executrix who had proved in *England* was entitled, and the assignees in order to obtain it must sue such personal representative.

On petition by the executrix for payment of the fund, inquiry as to domicil ordered.

THIS was a Petition by the widow and executrix of *George Henwood*, deceased, for the payment out of Court of a fund representing his share under a will of certain stock, in which he had a vested interest subject to the life interest of his mother.

Previously to the year 1863, *Henwood*, being entitled to the said reversionary interest, went to *South Australia*, where he entered into business and became insolvent under the Act of the Colonial Legislature.

In November, 1863, after *Henwood's* insolvency, his mother died, and *Henwood*, in December, 1863, executed a deed reciting that it was doubtful whether the Colonial Act vested landed property in *England* in the assignees, and assigning to the assignees all his real and leasehold estates in *England*, but the deed did not include other personal property.

In 1864, *Henwood* died in *South Australia;* the trustees of the will paid the money into Court, and the present Petition was presented by his executrix, who had proved his will in *England*, the question being whether the Petitioner or the assignees in *South Australia* were entitled to the fund.

By Act No. 16 of 23 & 24 Vict. of *South Australia*, s. 100, it is enacted "that when any person shall have been adjudged an insolvent, his personal estate and effects present and future, where-

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soever the same may be found or known, and all property which he may purchase, or which may revert, descend, be derived or bequeathed, or come to him, before he shall have obtained a certificate barring the right of his assignees, and all debts due or to become due to him . . . . shall become vested in the assignees for the benefit of the creditors."

Mr. *Baggallay*, Q.C., and Mr. *Horsey*, in support of the Petition:—

The question in this case is, whether s. 100 of the *Australian Insolvency Act*, by which the personal estate of the insolvent became vested in the assignees, touched the stock in *England* now claimed by the present Petitioner. There is a further question as to the domicil of *Henwood:* on that point we submit that it was English; but even assuming that his domicil was Australian, the colonial insolvency cannot affect his English property. In *Bartley* v. *Hodges* (1), where an action was brought on a bill of exchange drawn and accepted in *England*, a plea of discharge under the insolvent law of *Victoria*, not alleging that either the Plaintiff or Defendant was domiciled in that colony, was held to be no answer to the action.

So in *Smith* v. *Buchanan* (2), a discharge under a commission of bankruptcy in a foreign country was held to be no bar to an action for debt brought in this country by a creditor against the bankrupt. It follows that property in this country cannot be taken by assignees in a colony. The case of *Solomons* v. *Ross* (3) seems, at first sight, to establish that a bankruptcy in *Holland* would affect property in this country; but that was a case of foreign attachment, and the bankrupt was domiciled in *Holland*. The personal estate can only pass to the assignees by such an instrument as would pass it in the country where the person claiming it has his domicil. Personal property in this country belonging to a person domiciled here can only pass by delivery or by deed, or by contract, or by bankruptcy here, not by bankruptcy or insolvency in a foreign state or colony. The insolvency there could not be pleaded as a release of a debt.

(1) 1 B. & S. 375 (2) 1 East. 6. (3) 1 H. Bl. 131, *n.*

[*The Royal Bank of Scotland* v. *Cuthbert* (1), and *Townsend* v. *Early* (2), were also referred to.]

Mr. *Martelli*, for the assignees in *Australia*:—

On the question of domicil, the presumption is in favour of *Henwood's* domicil being Australian, as he entered into trade and died in that colony; *Jopp* v. *Wood* (3): for in determining a person's domicil, as was observed in *Bempde* v. *Johnstone* (4), "the actual place where he is, is, *primâ facie*, to a great many given purposes, his domicil." But assuming his domicil to have been English, even then the Australian assignees would be entitled to it. *Solomons* v. *Ross* (5) has always been treated as a binding decision on this point. It was recognised in the case of *Sill* v. *Worswick* (6), where it is said that the determinations of the Courts of this country are uniform to admit the title of foreign assignees. The case of *Selkrig* v. *Davis* (7) decided that an assignment under an English commission would vest in assignees all personal property in *Scotland*. A foreign insolvency is analogous to a foreign judgment, which by the comity of nations would attach on property in this country.

[He also referred to *Ex parte Cridland* (8).]

Mr. *Bristowe*, for the trustees of the will.

Mr. *Baggallay*, in reply.

1866, Jan. 17. LORD ROMILLY, M.R., after stating the facts of the case, continued:—

By the Colonial Act of *South Australia*, No. 16 of the 23 & 24 Vict., the property of the insolvent vested in the assignees exactly in the same way as when a person becomes insolvent in this country. The question is, whether the English executrix or the Australian assignees are entitled to receive this money?

(1) 1 Rose, 462.
(2) 34 Beav. 23.
(3) 34 L. J. (Ch.) 212.
(4) 3 Ves. 198, 201.
(5) 1 H. Bl. 131, *n.*
(6) Ibid. 665, 669.
(7) 2 Rose, 97, 291.
(8) 3 V. & B., 94.

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I am of opinion, upon examining all the cases which have been cited to me, and considering it as carefully as I can, that this is a question of domicil, and depends upon domicil alone; and that if *Henwood* was a domiciled Australian at the time, then that this property passed to the assignees, but that if he was not, then it passes to his legal personal representative, and she is the person entitled to receive it. That does not dispose of everything, but it was argued with great force, although I do not think it affects this particular question, that if the domicil was not Australian, nevertheless, by reason of the comity of nations, this would follow—that the insolvency being in the nature of a foreign judgment, the Court would give effect to it, and give the parties the benefit of it against the property of the insolvent in this country; and Mr. *Martelli* cited several cases to establish that point. I am disposed to assent to that, but I do not think it would entitle the assignees to receive this sum of money. I think that the legal personal representative must receive it; for where a person domiciled in this country has contracted debts abroad, upon which a foreign judgment has been obtained, the judgment creditor abroad must, on his decease, sue his legal personal representative in this country for the purpose of recovering upon that judgment. Various questions may thereupon arise. He is not entitled to take away the whole of the fund, but questions of priority, questions of other judgments, and other considerations may arise; they may be entitled to be paid *pari passu*, or the executor may be entitled to contest the foreign judgment, or the like.

I am therefore of opinion that, upon this occasion, assuming the domicil to be English, the money ought to be paid to the Petitioner, who is the legal personal representative, and that it is for the assignees to take such steps as they may think fit for the purpose of asserting their claim. If they thought it was necessary to take any proceedings I might, before I ordered the money to be paid out, allow a certain time to elapse, to enable them to take any proceedings they thought they could take for the purpose of impounding the fund. But then, as I have already observed, the question to whom the fund goes depends on the question of domicil, which, in the present state of the evidence, I cannot determine. But upon the extremely

meagre evidence at present before me, namely, that some time before the year 1863 *George Henwood* went to *Australia*, carried on business there, became insolvent, and died there in the year 1864, there is not enough to induce me to come to a conclusion that he had changed his domicil; but if Mr. *Martelli* wishes it, I will direct a reference to ascertain what was the domicil of *George Henwood* at the time of his insolvency.

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Mr. *Martelli*: I think the assignees are bound to have that inquiry.

LORD ROMILLY, M.R.:—Then I think I must give it them.

Solicitors for the Petitioner:—Messrs. *Brundrett, Martin, & Randall.*

Solicitors for the Assignees:—Messrs. *Torr, Janeway, & Tagart.*

Solicitors for the Trustees:—Mr. *R. B. Wheatley.*

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M. R. 1866 *April* 19, 24.

Apportionment—4 & 5 Will. 4, c. 22—Lease after Act under previous Power.

The *Apportionment Act* applies either where the instrument creating the life interest, or where the lease in respect of which the apportionment arises bears date after the statute.

Accordingly, where a lease was granted after the passing of the Act under a power in a settlement executed prior to the Act:—

Held, that the rent reserved by the lease was apportionable between the tenant for life and remainderman under the settlement.

UNDER a settlement made in 1797, certain hereditaments stood limited to *Hanbury Leigh* for life, with remainders over, with a power for *Hanbury Leigh* to grant mining leases.

In pursuance of this power four mining leases, the first of which was dated in 1837, were granted by *Hanbury Leigh*, and in consequence of his death on the 28th of September, 1861, the question arose whether his estate was entitled to an apportioned share of the royalties under those leases which accrued

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due in that year as follows:—Under the first lease, a half-yearly payment on the 25th of November; under the second, a quarterly payment on the 29th of November; under the third, a quarterly payment on the 29th of September; and under the fourth, a half-yearly payment on the same day.

The question of apportionment, as between the estate of *Hanbury Leigh* and those entitled in remainder, came before the Court, on further consideration, in a suit instituted for the administration of the estate of *Molly Hanbury Leigh*, the wife of *Hanbury Leigh*, whose property was comprised in the settlement of the 12th of April, 1797, and who, by her will, executed certain powers of appointment contained in the settlement. The suit embraced other questions not referred to in the present report.

Mr. *Selwyn*, Q.C., and Mr. *Freeling*, for persons entitled in remainder:—

In this case the settlement creating the life interest of the tenant for life, and containing the leasing power, was before the Act of 4 & 5 Will. 4. c. 22 came into operation, and all the leases were subsequent to the Act. The second section provides that all "rents payable *under any instrument that shall be executed after the passing of the Act*," shall be apportioned. These words refer to the instrument creating the right to receive rents, meaning the landlord's interest, so that, with respect to leases granted under a power conferred by a settlement made before the Act, the statute does not apply, and there can be no apportionment. The only case on the statute that has come before an Appeal Court is that of *In re Markby* (1), where this question did not arise. The decisions of the Courts of first instance on the subject are conflicting. In *Knight* v. *Boughton* (2) it was held that the "instrument" referred to in the Act was not the instrument creating periodical payments, but that creating the life interest. The case of *Lock* v. *De Burgh* (3) is an authority the other way, but was disapproved of by Vice-Chancellor *Kindersley* in *Fletcher* v. *Moore* (4). The recent decision of Vice-Chancellor *Wood* in *Plummer* v. *Whiteley* (5) is, no doubt, opposed to the construction of the statute

(1) 4 My. & Cr. 484. (2) 12 Beav. 312. (3) 4 De G. & Sm. 470.
(4) 26 L. J. (Ch.) 530. (5) Joh. 585.

for which we contend, and there His Honour endeavoured to reconcile the various conflicting authorities. In *Wardroper* v. *Cutfield* (1) Vice-Chancellor *Kindersley* adopted the same view. Notwithstanding these decisions, the reasoning of the learned judges is in favour of the view that, where the instrument creating the power is prior to the *Apportionment Act*, there can be no apportionment, and, in the absence of any decision in the Court of Appeal, we submit that in the present case there should be no apportionment of the royalties.

Mr. *Baggallay*, Q.C., and Mr. *Upton*, for another person in the same interest:—

On the question of apportionment, we support the same contention. The two clauses of the second section must be read conjunctively. The leases, being granted under a power before the passing of the Act, must be taken to be leases granted before the Act, especially as, from the nature of the settlement, the power must have been exercised by the revocation of uses and appointment to new uses. In *Knight* v. *Boughton* (2) Lord *Langdale* does not refer to the words in the first branch of the clause. The cases of *Plummer* v. *Whiteley* (3) and *Wardroper* v. *Cutfield* (1) both depend on the construction by which the section is split into two parts, whereas it should be read thus; "rents reserved .... by any lease granted under any power .... and all rents &c., under any instrument that shall be executed after the passing of this Act—" the words "and which leases shall have been granted after the passing of this Act," being merely added by way of explanation of the words previously used. The section cannot be split in two without overruling Lord *Cottenham's* decision in the case of *In re Markby* (4).

Mr. *Pemberton* for the executors of *Hanbury Leigh*:—

In this case the *Apportionment Act* applies. If the tenant for life had granted the leases for his own life, no question of apportionment could have arisen, so that the Act gives him no greater interest than he could have obtained under the settlement. The

(1) 33 L. J. (Ch.) 605. (2) 12 Beav. 312. (3) Joh. 585.
(4) 4 My. & Cr. 484.

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case of *In re Markby* (1) has nothing to do with the present question. The royalties are clearly apportionable, and the cases of *Knight* v. *Boughton* (2), *Lock* v. *De Burgh* (3), *Plummer* v. *Whiteley* (4), and *Wardoper* v. *Cutfield* (5) are all authorities in our favour.

Mr. *Jessel*, Q.C., Mr. *Druce*, and Mr. *Edward Hanson*, for other parties.

Mr. *Selwyn*, in reply, referred to *St. Aubyn* v. *St. Aubyn* (9).

April 24. LORD ROMILLY, M.R.:—

I think that on the question of apportionment it is impossible to get over the cases. I have no hesitation in coming to the conclusion that the *Apportionment Act* applies, as the Vice-Chancellor Sir *W. P. Wood* determined, in both cases, that is to say, either where the instrument creating the interest bears date after the statute, or where the lease which also gives rise to it bears date after the statute, for certainly the Act of Parliament seems to bear that construction. The principal authority against it is the case of *St. Aubyn* v. *St. Aubyn* (6), in which it was determined that unless the payments are periodical the *Apportionment Act* does not apply, the words "coming due at fixed periods" being treated as applicable to the whole clause. It is inferred from that, that if you construe the clause as referring to two distinct cases—namely, where the instrument creating the interest is subsequent to the passing of the statute, and where the lease itself which creates the matter in respect of which the apportionment arises is subsequent to the Act—it is very difficult to reconcile that construction with the fact that the condition of payment at fixed periods should always attach, and that there should by no apportionment of uncertain royalties on ore raised from a mine. Upon that I express no opinion, I do not even say that there is any such conflict; but I am of opinion that there is more to be said in favour of the statute applying to the two classes of cases, than there is in favour of limiting it only to one.

(1) 4 My. & Cr. 484.
(2) 12 Beav. 312.
(3) 4 De G. & Sm. 470.
(4) Joh. 585.
(5) 33 L. J. (Ch.) 605.
(6) 1 Dr. & Sm. 611.

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The Act is a remedial Act; it was intended to give the person whose interest expired what was considered the fair and proper allowance of the income up to the time of his death, and, therefore, I think the statute must be construed liberally; and so construing it I follow the decision of the Vice-Chancellor Sir *W. P. Wood* in *Plummer* v. *Whiteley* (1), and the other authorities to the like effect, and hold that apportionment must be allowed in the present case.

Solicitors: Messrs. *Uptons, Johnson, & Upton*; Messrs. *Robinson, Barlow, & Bowling.*

PATERSON *v.* PATERSON.

M. R.
1866
April 23, 24.

Trustee Act, 1850, *ss.* 28, 34—*Practice—Lord of Manor—Copyholds, New Trustee of—Vesting Order—Disclaiming Trustee—Admittance—Double Fine.*

P., a trustee of copyholds, devised them to *S.*, who was not his customary heir, and died. *S.* having disclaimed the devise, the Court of Chancery, upon the Petition of the *cestuis que trust*, which was not served upon the lord of the manor, made an order, under the *Trustee Act*, 1850, appointing *B.* trustee in the place of *P.*, and vesting in *B.* all the estate in the copyholds, which would have vested in *S.*, if *S.* had accepted the devise in *P.*'s will:—

Held, upon a Petition by the lord of the manor to discharge the order and rehear the former Petition, that the order was in the proper form, and was properly made without the consent of the lord of the manor, and did not prejudice the question whether he was entitled to a single or a double fine for *B.*'s admittance; and that the *cestuis que trust* were right in not serving their Petition upon the lord.

Semble, the lord was not entitled to a double fine.

THIS was a Petition by the lords of a manor, praying that an order, made under the *Trustee Act*, 1850, vesting certain copyholds of the manor in a trustee appointed by the order, might be discharged; and that the Petition upon which such order was made might be reheard.

Peter Paterson the elder, who died in 1860, devised the copyholds in question to his son, *Peter Paterson* the younger, his heirs and assigns, upon certain trusts; and in 1861, *Peter Paterson* the

(1) Joh. 585.

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younger was admitted tenant of the copyholds, to hold to him, his heirs and assigns, according to the tenor and effect of the will. *Peter Paterson* the younger died in June, 1864, having by his will devised all his real estate to his wife, *Sarah Paterson*, her heirs and assigns, and leaving his brother his customary heir. In May, 1865, *Sarah Paterson* by deed disclaimed the devise of the copyholds contained in her husband's will; and on the 3rd of June, 1865, an order was made by the Court, under the *Trustee Act*, 1850, upon the Petition of *Sarah Paterson* and some of the *cestuis que trust* under the will of *Peter Paterson* the elder, by which *Abraham Booth* was appointed trustee of the will of *Peter Paterson* the elder, so far as related to the copyholds thereby devised, in substitution for *Peter Paterson* the younger; and it was ordered that all the estate and interest in the copyholds, which would have vested in *Sarah Paterson* if she had accepted the devise of the same hereditaments contained in the will of *Peter Paterson* the younger, should vest in *Booth* upon the trusts of the will of *Peter Paterson* the elder.

Before the Petition, upon which the above order was made, was presented, the lords of the manor informed the solicitor of the Petitioners, who had sent them the draft of the Petition, that they would not consent to an order according to the prayer of the Petition; and that they should object to abide by any order, unless they were served with the Petition, and allowed to argue the question by Counsel; and that, if there was any technical difficulty, they were willing to appear and waive it in order to be heard. The Petition, however, was not served upon them.

In July, 1865, *Booth* applied to the lords to be admitted to the copyholds; but they refused to admit him unless he would undertake to pay two fines and two sets of fees in respect of two devolutions of the title, the first upon the heir of *Peter Paterson* the younger, and the second upon himself under the vesting order, which he refused to do. He then applied to the Court of Queen's Bench for a *mandamus* to compel the lords to admit him; and a rule to shew cause was granted, which had not been argued when the present Petition was heard.

The present Petition alleged that the order of the 3rd of June was informal and irregular, as having been made without the con-

sent of the lords of the manor; but that the Court of Queen's Bench would treat such order as formal and regular; and that the lords would not be able to resist the issuing of a *mandamus*, and would thereby lose the fines, which were properly payable by *Booth* on his admittance.

Mr. *Selwyn*, Q.C., and Mr. *Nalder*, for the Petitioners:—

The devisee having disclaimed, the lords became entitled to a fine in respect of the descent of the legal estate to the heir; and without paying that fine, the heir could not have surrendered to the use of the new trustee: *Morse* v. *Faulkner* (1); *Brown's Case* (2); *Lord Londesborough* v. *Foster* (3); *Scriven* on Copyholds (4); *Cruise's* Digest (5); *Gilbert's* Tenures (6); and a second fine would have been payable on the admittance of the new trustee. The *Trustee Act*, 1850, was not intended to prejudice the rights of lords of manors. The 28th section impliedly prohibits the making of a vesting order of copyholds without the lord's consent, and points out the proper form of order, when that consent has not been obtained, viz., the appointment of a person to convey the land. If that had been done here, there could be no question as to the right of the lords to a double fine; but the order, in its present form, places the new trustee in the same position as the devisee before disclaimer, when she might have been admitted on payment of a single fine. *In re Flitcroft* (7), in which an order like the present was made, was not followed in *Cooper* v. *Jones* (8), and *In re Howard* (9). The Court of law will not look beyond the order of this Court: *In re Lane and Irving* (10).

Mr. *Joshua Williams*, Q.C., and Mr. *C. Browne*, for the parties (other than *Sarah Paterson*) who obtained the order:—

The 34th section of the *Trustee Act*, under which this order was made, enables the Court to make vesting orders of lands of any tenure, and for such estate as the Court shall direct. The 28th

(1) 1 Anstr. 11.
(2) 4 Rep. 22.
(3) 3 B. & S. 805.
(4) P. 342, 4th ed.
(5) Vol. i. Tit. x. c. 4, s. 2.
(6) P. 292.
(7) 1 Jur. (N.S.) 418.
(8) 25 L. J. (Ch.) 240.
(9) 3 W. R. 605.
(10) 12 W. R. 710.

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section dispenses with the necessity of surrender and admittance where a vesting order of copyholds is made with the lord's consent, but does not require such consent. The order, therefore, is regular, and it is the same form as the orders made in *In re Flitcroft* (1) and *In re Hurst* (2). *In re Howard* (3) was a case of descent, not of devise. The lords have no *locus standi* in this Court; they could not have been compelled to consent to the order being made; and it would have been irregular to serve them with the Petition: *Ayles* v. *Cox* (4). The question whether they are entitled to a double fine cannot be tried in this Court, and will not arise until they have admitted *Booth* and brought an action against him for the amount of the fine which they claim; and the form of the vesting order will not prejudice their rights in such action. It is true that they have no defence to the *mandamus*, but that is not because of any irregularity in the vesting order, but because a lord is bound to admit before payment of the fine: *Watkins on Copyholds* (5); *Reg.* v. *Wellesley* (6); *Rex* v. *Lord of the Manor of Hendon* (7). But in fact only one fine is payable. The legal estate in devised copyholds vests in the heir until the devisee claims to be admitted, and the new trustee may be substituted for the devisee, and claim admittance on payment of a single fine, in the same manner as a purchaser from executors under a power of sale in the will of a copyholder.

Mr. *Ellis* for *Sarah Paterson.*

Mr. *Speed* and Mr. *Pontifex* for other parties beneficially interested in the copyholds.

Mr. *Selwyn*, in reply:—

If a testator, besides giving his executors a power of sale over copyholds, devises the legal estate to the executors, a double fine is payable on the purchaser's admittance: *Reg.* v. *Wilson* (8); *Reg.* v. *Lady of the Manor of Dullingham* (9). The effect of the

(1) 1 Jur. (N.S.) 418.
(2) Set. on Dec. 799.
(3) 3 W. R. 605.
(4) 17 Beav. 584.
(5) Vol. i. p. 323, 4th ed.
(6) 2 E. & B. 924.
(7) 2 T. R. 484.
(8) 3 B. & S. 201.
(9) 8 Ad. & E. 858.

9 Jun 8/1873

disclaimer was that the devisee never had any estate vested in her: *Townson* v. *Tickell* (1); *Stacey* v. *Elph* (2). She never was a trustee, and *Booth* was not appointed in her place, but in the place of the deceased trustee. The Petitioners are willing that this Court should decide the question of the fines; but at all events they ask to have the order made in such a form as not to prejudice their right.

LORD ROMILLY, M.R.:—

I am of opinion that the form of the order was quite right; it is the form in which I have made many orders before, and the ordinary form in which the Court makes orders on appointing new trustees of copyholds. I am also of opinion that the parties who obtained the order were rightly advised that they could not properly serve the lords of the manor with their Petition, and that the hearing of that Petition was not a proper occasion on which to discuss the question of the right of the lords to a double fine. I am also of opinion that this order will not prejudice the lords in the slightest degree, and that if they think fit to bring an action for the double fine, and they are entitled to a double fine, the form of my order will not in the slightest degree prevent them from recovering it. If the question depends on whether there were two devolutions of title, then I am bound to say that, though I have directed my attention as far as I could to all the arguments very ably put and very ably worked out by Mr. *Selwyn*, he has failed in convincing me that there are two devolutions of title in this case; and though it might be very advantageous to his clients if I were to put the order in the form in which he asks it, so as to make it expressly two devolutions of title, I am not entitled to do that, nor have I seen any order in that form; nor am I aware that the lord of a manor is entitled to require a fine to be paid to him upon the substitution of one trustee for another, provided there has been no admittance of the former trustee. Unquestionably, if there has been an admittance of the former trustee, the lord is entitled to a fine, and when a new trustee is appointed the lord is entitled to another fine on his being admitted; but if the Court appoints a

(1) 3 B. & A. 31. (2) 1 My. & K. 195.

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new trustee, and the order is passed and entered, and before the trustee is admitted, he dies, and the Court appoints another trustee in the place of the original trustee, I am not aware, nor have I found any case to shew me, that the devolution of title entitles the lord to a second fine. I am rather disposed to think that the view which Mr. *Joshua Williams* stated is the correct view, that in substance the copyhold descends to the heir subject to the right of the devisee to be admitted, there being no beneficial interest whatever in the heir; and where the tenant of the copyhold has devised the land so that it descends to the heir subject to the right of admission of the devisee, the Court has full power to substitute another person instead of the devisee. But upon this I do not mean to express any opinion further than for the purpose of shewing that in my opinion the form of the order is correct. I wish it to be expressly stated to the Court of Law, in the event of proceedings being taken at law, that I do nothing now in the slightest degree to prejudice the right of the lords, but that I consider this was the right form of the order; that the lords had no right to come here to complain of that form of order, or to require me to rehear the case; that it would have been wrong to have served them with the Petition; and that the order must be allowed to stand. I am of opinion that the only order I can make upon this Petition is to dismiss it, and to direct that the Petitioners pay the costs. I have been obliged, to some extent, to express my opinion, for the purpose of endeavouring to shew why the order was a correct one; but I will now, if the parties wish it, subject to an appeal, take further time to consider the question whether a double fine is payable or not, and more fully examine the authorities than I have done.

The Respondents declined to submit the question of the double fine to his lordship's decision, and the Petition was dismissed with costs.

Solicitors for the Petitioners: Messrs. *Coverdale & Co.*

Solicitors for the Respondents: Mr. *Bodman;* Messrs. *Jones, Mancell, & West;* Mr. *Armstrong;* Mr. *H. D. Roberts.*

RAPHAEL *v.* THAMES VALLEY RAILWAY COMPANY.

M. R. 1866 Jan. 15, 24, 25; April 20.

Railway Company—Accommodation Works—Specific Performance—Mandatory Injunction—Public Convenience.

It is a ground for refusing specific performance of an agreement, that such specific performance may interfere with the safety or convenience of the public.

Therefore, where a railway company agreed with a landowner to execute certain accommodation works, and, having made the railway at such a level as to render it impossible for them to execute the works according to the agreement, so executed them as to give the landowner a less convenient approach to his house, the Court refused, after the railway had been opened for public use, to decree the specific performance of the agreement, which would have involved the alteration of the level of the railway, although the works were not completed, nor the railway opened, until after the filing of the bill, and after a motion for an injunction to restrain the completion of the works had been made and ordered to stand over upon an undertaking by the company to deal with the works as the Court should direct.

A railway company agreed, under seal, with the vendor of lands taken by them to make and maintain certain accommodation works:—

Held, that the vendor was not entitled to have a covenant by the company in the terms of the agreement inserted in the conveyance of the land to the company.

THIS was a suit for the specific performance of an agreement by the Defendants to execute certain accommodation works, and for an injunction to restrain them from making such works or allowing them to continue otherwise than in accordance with such agreement.

By an agreement dated the 8th of May, 1862, and made between *W. S. Lindsay* and *Sir W. Clay*, two of the promoters of the *Thames Valley Railway Company*, of the one part, and the Plaintiff, *Edward Raphael*, the owner of an estate called the *Kempton Park* Estate, through which the company's projected line of railway was intended to pass, of the other part, in consideration of *Raphael* withdrawing his opposition to the bill then before Parliament for authorizing the formation of the railway, *Lindsay* and *Clay* agreed (among other things) that the company should not take

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a larger quantity of *Raphael's* land than was absolutely necessary for the permanent way of the railway, and should not without the consent in writing of *Raphael*, his heirs or assigns, construct, erect, or make any building whatever (except such arches or culverts as thereinafter provided for), or lay down any siding or other line of rails, except the double line of rails on the railway, upon *Raphael's* land, or the land to be purchased from him by the company; that the company should make certain arches for carrying the railway over the lodge road leading to *Raphael's* house, and give him a right of way under such arches, and should also erect and maintain all such and so many other accommodation works as might be necessary, and could be required under the provisions of the *Railways Clauses Consolidation Act*, 1845, or the *Lands Clauses Consolidation Act*, 1845; and *Raphael* agreed to withdraw his opposition and to consent to the bill, and to sell to the company at a specified price and make a good title to such of his land as should be required for the purpose of the railway.

The *Thames Valley Railway Act* incorporating the company received the Royal assent in July, 1862, and by it the above agreement was made binding on the company, as if they had been party to it, and had been named throughout in the place of *Lindsay* and *Clay*, and as if the agreement had been made under their seal.

On the 15th of July, 1863, the company desiring to make their railway at a lower level than was originally proposed, a further agreement was made between them and *Raphael*, by which, after reciting that the company had proposed to alter the gradient of part of their line of railway passing through *Raphael's* land, so as to make the altered gradient in the line coloured red on the plan annexed to the agreement, and had requested *Raphael* to consent to such alteration or gradient, and also not to require the arches to be made under the former agreement, which he had agreed to do on the terms and conditions thereinafter expressed, and that the company had acceded to such conditions and terms, and had agreed to make the railway according to the annexed plan, so far as regarded the gradient, it was witnessed (among other things) that the company agreed, instead of making the arches over the lodge road, to construct and complete a new road between certain

specified points on the existing lodge road, of a specified width, and in a course marked on the plan, with a specified maximum inclination, and to construct and maintain at a specified point a bridge of specified dimensions carrying the new lodge road over the railway, with proper approaches of a specified maximum incline, and with various alterations (such new road, bridge, approaches, and alterations to be made to the reasonable satisfaction of *Raphael's* surveyor, and such bridge to be so constructed as to interfere with and obstruct the existing lodge road as little as possible consistent with the deviation thereof thereby authorized and to make the continuation thereof as convenient as possible, having regard to the nature of the mode of carrying it over by a bridge), and also to make certain level crossings, culverts, ditches, and other works. The agreement contained a provision that any dispute which should arise respecting the formation of the arches, roads, crossings, approaches, culverts, gates, or other accommodation works thereby agreed to be made, should be settled and provided for as directed by the *Railways Clauses Act.* This agreement, having the plan annexed, was executed under the seal of the company.

In August, 1863, *Raphael* contracted to sell the *Kempton Park* Estate to *Thomas Barnett*, who made the contract on the joint account of himself and *Henry William Birch.*

The company took possession of the land, and made their railway at a level somewhat higher than that marked on the plan annexed to the agreement of July, 1863, thereby making it impossible for them to make the approaches to the bridge of the specified inclination without either altering the position of the bridge and the course of the lodge road from the specified position and course, or else extending the approaches to the bridge beyond their statutory limits of deviation.

On the 30th of December, 1863, their solicitors wrote to *Raphael's* solicitors a letter to the effect that the plan annexed to the agreement of July, 1863, was incorrect, that it was physically impossible within the company's limits of deviation to construct the approach to the lodge road bridge in the exact position shewn by the plan, with the rate of inclination stipulated by the agreement, and that, therefore, the course of the approach

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must be slightly diverted in a curve eastward. On the following day *Raphael's* solicitors wrote in reply, denying the incorrectness of the plan, and declining to assent to any deviation from the agreement.

The company postponed the making of the bridge and road for some months, in consequence of an abortive proposal to make a station on the *Kempton Park* Estate, in which case it was supposed that the bridge would not be required; but on the 16th of May, 1864, their solicitors informed *Raphael's* solicitors that the bridge would be at once proceeded with in a manner which would be a deviation from the agreement.

In the meantime a dispute had arisen as to the deed of conveyance of *Raphael's* land to the company, *Raphael's* solicitors insisting on, and the company's solicitors objecting to, the insertion of covenants by the company to perform the stipulations of the two agreements, and a proposal to refer this question to one of the conveyancing counsel of the Court of Chancery had been refused by the company.

On the 17th of May, 1864, *Raphael's* solicitors wrote to the company's solicitors, threatening to file a bill for specific performance if the company refused to insert the required covenants, and if they persisted in their intention of building the bridge in the manner proposed.

On the 18th of May the company staked out the course of the new lodge road in a curve, so as to deviate considerably from the line defined by the plan, and began to build the bridge about thirty yards from the spot specified by the agreement.

On the 23rd of June *Raphael* filed the bill in this suit against the company and their secretary, praying for the specific performance of the two agreements, so far as they remained unperformed, and for an injunction to restrain the company from making the lodge road and bridge, except of the width, with the inclinations and curves, and at the points mentioned or referred to, and in the manner specified in the agreement of July, 1863.

On the 25th of July a motion for an interim injunction was made, but was ordered to stand over till the hearing of the cause, upon the Defendants undertaking to deal with the bridge and road and works as the Court should at the hearing think fit to direct.

The company completed the bridge and approaches in September, 1864, and the railway was opened for public traffic in November, 1864. In addition to the bridge they made a level crossing at the place where the old lodge road crossed the railway.

In October, 1864, the Defendants put in their answer, in which they alleged that the plan was incorrect, and insisted that they had performed the agreement as nearly as possible, and submitted that *Barnett* and the other persons (if any) for whose benefit he had contracted to purchase the *Kempton Park* Estate, were necessary parties to the suit.

On the 23rd of December, 1864, *Raphael* conveyed the *Kempton Park* Estate to *Barnett* and *Birch*, and in February, 1865, the bill was amended by making them co-Plaintiffs. The amended bill complained of the raising of the level of the railway as a breach of the agreement, and of other alleged variations in the making of level crossings, culverts, and ditches, and prayed for an injunction extending to these matters as well as to the lodge road, bridge, and approaches.

The evidence was conflicting both as to the amount of injury caused to the Plaintiffs by the deviation from the agreement, and as to the feasibility and consequences of making the alterations necessary to comply with the terms of the agreement, the Plaintiffs' witnesses maintaining that the existing approaches to the bridge were extremely inconvenient and dangerous, that the company could easily have complied with the terms of the agreement, and that the level of the railway could be lowered, the bridge rebuilt, and the approaches made in conformity with the agreement, without any interference with the use of the line, and without risk or inconvenience to the public; while the Defendants' witnesses asserted, that raising of the railway to its present level was necessary, in order to secure effective drainage, that a strict adherence to the agreement as to the levels would have been a far greater injury to the estate than the works actually executed, and that the alteration of the railway and works so as to comply with the agreement would be attended with a certain amount of risk to the public, and would rather injure than benefit the *Kempton Park* Estate.

The land beyond the company's limits of deviation, with which

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they must, in consequence of raising the level of the railway, have interfered, in order to make the approaches to the bridge according to the agreement, was part of the *Kempton Park* Estate.

Mr. *Jessel*, Q.C., and Mr. *Rawlinson*, for the Plaintiffs:—

The Defendants having received the consideration for which they agreed to execute the works, viz., the Plaintiff *Raphael's* consent to the passing of their Act and the possession of his land, the Court will compel them specifically to perform their contract without reference to the degree of injury to the Plaintiffs caused by its non-performance: *Sanderson* v. *Cockermouth & Wokington Railway Company* (1); *Storer* v. *Great Western Railway Company* (2); *Lord Darnley* v. *London, Chatham, & Dover Railway Company* (3); *Price* v. *Mayor of Penzance* (4); *Wells* v. *Maxwell* (5); *Blackett* v. *Bates* (6); and if a mandatory injunction is essential to specific performance, will grant such injunction, at whatever cost to the Defendants: *Great North of England Railway Company* v. *Clarence Railway Company* (7); *Earl Mexborough* v. *Bower* (8); *Davis* v. *South Eastern Railway Company* (9); *Spokes* v. *Banbury Board of Health* (10). But here the Plaintiffs will sustain serious and permanent injury, which cannot be compensated by damages; and the Defendants have violated the agreement with full knowledge that the Plaintiffs would insist upon the stipulations of the contract, and after undertaking to deal with the works as the Court should direct. The alleged incorrectness of the plan is disproved; but even if it were incorrect, it is binding on the Defendants until rectified in a suit instituted for the purpose. The difficulty of making the bridge and road according to the agreement was caused by the Defendants' own act in raising the level of the line, which is itself a breach of the agreement. Even if they could not perform the agreement without extending the works beyond the limits of deviation, they might have gone beyond those limits with the consent of the Plaintiffs, who owned the land upon which they would

(1) 2 H. & T. 327.
(2) 2 Y. & C. Ch. 48.
(3) 9 Jur. (N. S.) 148.
(4) 4 Hare, 506.
(5) 32 Beav. 408, 419.
(6) 2 H. & M. 270.
(7) 1 Coll. 507.
(8) 7 Beav. 127.
(9) 23 Beav. 549.
(10) Law Rep. 1 Eq. 42.

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have encroached. The Plaintiffs are entitled to have the covenants inserted in the conveyance to the company, as they are part of the consideration for the sale of the land. The evidence shews that the lowering of the level of the railway, and the restoration of the bridge and road to the stipulated position, is a mere question of expense, involving no risk or inconvenience to the public.

[During the argument of the Plaintiffs' counsel, the Master of the Rolls suggested a compromise, and directed the hearing to stand over for a week, but the parties could not agree.]

Mr. *Selwyn*, Q.C., and Mr. *E. K. Karslake*, for the Defendants:—

The Court will not interfere by way of mandatory injunction to enforce specific performance of an agreement if there has been no wilful breach, or if the Plaintiff has sustained no substantial injury: *Durell* v. *Pritchard* (1); *Elmhirst* v. *Spencer* (2); *Western* v. *MacDermot* (3); *Clarke* v. *Clark* (4); *Robson* v. *Whittingham* (5). The Defendants have not wilfully broken the agreement: they were in this dilemma, that they must either depart from the precise terms of the agreement in making the bridge and road, or go upon the Plaintiffs' land beyond their limits of deviation, which they had no power to do, and which they were expressly prohibited from doing by the agreement of May 1862. The Plaintiffs were informed of the difficulty in December 1863, but they did not offer to let the Defendants go beyond the limits of deviation. There was no stipulation in the agreement as to the level at which the line was to be made, and the existing level was adopted as the safest and most convenient, both for the travelling public and for the adjoining lands, and was not complained of in the original bill. The Plaintiffs have sustained no substantial injury; the additional curve in the present lodge road is very slight, and besides the bridge they have a level crossing, where the old lodge road crosses the line. The delay in bringing the cause to a hearing shews that the Plaintiffs have not felt any serious inconvenience from the existing state of things.

(1) Law Rep. 1 Ch. 244: 12 Jur. N.S. 816
(2) 2 Mac. & G. 45.
(3) Law Rep. 1 Eq. 499: 12 Jur. N.S. 657.
(4) Law Rep. 1 Ch. 16: 11 Jur. N.S. 914.
(5) 12 Jur. (N. S.) 40: 10 L.T. 442.

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All the other matters complained of are trifling, and were never mentioned until the amendment of the bill, seven months after the original bill was filed. The insertion of the covenants relating to the accommodation works in the conveyance would be unnecessary and improper; the original agreements being sufficient to secure the performance of such of those covenants as have not been already performed. The Court has never gone the length of compelling a railway company to alter the level of their railway, after it has been sanctioned by the Government Inspector and opened for public use; such alteration would be dangerous to the public, whose interests the Court is bound to protect. The provision in the agreement of July, 1863, that all disputes shall be settled as provided by the *Railways Clauses Act*, precludes the Plaintiffs from obtaining relief in this Court, or at all events is a reason for the Court exercising its discretion to refuse a decree for specific performance: *Scott* v. *Avery* (1); *Dimsdale* v. *Robertson* (2); *Scott* v. *Corporation of Liverpool* (3). The Plaintiffs might have executed the works themselves at the expense of the Defendants under the 68th and 70th sections of the *Railways Clauses Act*.

Mr. *Jessel*, in reply:—

In *Western* v. *MacDermot* (4) a mandatory injunction was granted; the other authorities cited on behalf of the Defendants were cases of nuisance, and do not apply to a case of contract. The alleged risk to the public from altering the level is disproved by the evidence, but if the Court has any doubt on that point, it may take the opinion of an expert under 15 & 16 Vict. c. 80, s. 42. The arbitration clause in the agreement is nugatory, inasmuch as the magistrate has no jurisdiction under the *Railways Clauses Act* in cases of contract; moreover, it does not apply to the bridge. The Defendants might have asked the Plaintiffs' consent to encroach on their land beyond the limits of deviation, but instead of this they persisted, notwithstanding the Plaintiffs' protest and threat of litigation, in violating the agreement.

(1) 5 H. L. C. 811. 2 Jur. N.S. 815
(2) 2 J. & Lat. 58.
(3) 3 De G. & J. 534: 5 Jur. N.S. 105
(4) Law Rep. 1 Eq. 499. 12 Jur. N.S. 366

LORD ROMILLY, M.R.:—

Will the Plaintiffs now allow the Defendants to go upon their land beyond the limits of deviation so as to make the bridge and road in the position and with the inclination specified in the agreement, without altering the level of the railway?

Mr. *Jessel*:—Yes.

April 20. LORD ROMILLY, M.R.:—

This is a suit nominally for the purpose of enforcing the specific performance of a contract, or of that portion of it which still remains unperformed, but in other words it is principally for the purpose of compelling the Defendants to pull down a bridge and remove a road made not in accordance with the contract, and to build another bridge and make another road which shall be in accordance with the contract.

The contract is clear and precise; the Act which incorporates the company confirms it and declares it to be binding upon them.

His Lordship then stated the effect and read the material clauses of the two agreements, and continued as follows:—

There is a dispute between the parties as to whether the plan referred to in the agreement of July, 1863, was agreed to, and whether it is correct, but I must, in the absence of any application to rectify the deed, of which this plan is a part, consider the contract to be set forth in the deed and the plan annexed thereto, as it now appears. Shortly after the execution of this agreement, and while the railway was in course of construction, it was found that, in consequence of the level of the railway being such as it now is, and having regard to the limits of deviation beyond which the company would not be entitled to go, it was impossible to construct the road or bridge in the exact positions indicated by the agreement and plan with the inclination specified in the agreement. Accordingly on the 30th of December, 1863, the solicitors of the company wrote to the Plaintiff's solicitors a letter to this effect [His Lordship read the

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letter]:—The Plaintiff's solicitors answered this letter the next day, refusing to admit any error in the plan. After much correspondence and some negotiations, which were broken off, on the 18th of May, 1864, the Defendants staked out the road, and commenced the foundations of the bridge as it now stands, making a considerable deviation from the line as defined by the plan: thereupon the Plaintiff filed this bill on the 23rd of June, 1864, and on the 25th of July moved for an injunction to restrain the Defendants from further proceeding with the bridge and road. This motion stood over till the hearing of the cause; the Defendants undertaking to deal with the bridge, road, and works as the Court should at the hearing think fit to direct In September, 1864, the present road and bridge were completed. As far as I can make out, the bridge is about thirty yards from the spot defined by the contract; as to the road, the curve of it is spoken of as very inconvenient, and even dangerous. The degree of the curve is not specified in the evidence, but as far as I can judge from the measurements, I should infer that it is very slight, except in one place of about twenty yards in length, and that at this spot it is for twenty yards the circumference of a segment of a circle with a radius of about thirty yards.

When the case was opened to me, and I found that the Plaintiff admitted that the road and bridge could not be made within the limits of deviation without lowering the railway, I desired that the further hearing of the cause should stand over, and suggested to both parties the expediency of coming to some arrangement which should dispense with the hearing of the cause. After some correspondence and discussion, neither party, as it appears to me from the correspondence, being disposed to give way in the least, the case came on again, and was argued before me. I have twice since then gone through the papers in order to consider the course which it would be proper for me to take in this case, which I have not found one of easy solution. The Plaintiff has gone into much evidence for the purpose of shewing that the railway might at no great expense be lowered, so as to permit the road to be made at the spot and with the inclination specified in the agreement; but it is the duty of the Court to remember that there is another class of persons who are not represented in this suit, and whose

interests must be carefully watched; that class is the public; and it would be too great, and much too dangerous a power for the Court of Chancery to exercise, were it to direct that the level of a railway actually in work, and engaged in carrying passengers and goods, should be altered for the purpose of the specific performance of a contract entered into between the company and a landowner. The inexpediency of exercising such a power is also much increased, when the specific performance of the contract solely involves a question whether a more or less convenient access should be made to a gentleman's mansion, and still more when that convenience is confined to the difference between a small circuit or deviation of the size and character I have described, and a comparatively straight road; for the statement in the Plaintiff's bill, that the curve is either dangerous or seriously inconvenient as it now stands, is, I think, very far from being established by the evidence. I am called upon, for the purpose of rectifying this deviation, to do what may sacrifice the convenience of the public, and very possibly make them incur some risk, and this in their absence. The deviation of the road and bridge as constructed may very possibly be an unsightly object, and, in my opinion, a landowner ought to be compensated for the unsightly objects which a railway presents, and the beautiful objects the sight of which a railway obstructs, and he is justified, when more serious rights are not jeopardised, in insisting on the specific performance of a contract to prevent such things from occurring. On this part of the subject, however, there is but little trustworthy evidence. I think upon the evidence that there was this mistake in the contract, of which the plan annexed to the agreement forms a part, that both parties believed that a road and bridge would be feasible on the spot and with the inclination specified in the contract, and with the railway at its present level, if it should be thought convenient to adopt such a level, and that it was not till the company were advanced in their work that it was found to be impossible so to construct the bridge and road. At the same time, it is certain that the bridge and road are not in accordance with the contract; and at one time I thought that if the Plaintiff would give the land required, which lies beyond the limits of deviation of the railway, I might compel the company to make

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a road and bridge in the place agreed upon, beginning the road from such a greater distance as would be sufficient to give the required inclination; but upon further reflection I am of opinion that I cannot do this; were I to attempt it, I should involve myself in inextricable difficulty; I could not compel, or indeed ask, the Plaintiff to give the land without compensation for it; I could not compel him to take any price except such as he thought fit to ask; nor could I compel the Defendants to give any price for the land that I might think reasonable; nor do I possess the means by which I could assess the proper value of the land required. I could not send it to any tribunal to have the value of the land assessed. In fact, were I to attempt to do what at first occurred to me, I should be substituting another agreement for that which was entered into, merely because, in my opinion, the first agreement could not be performed. I should be executing the agreement *cy pres*, which, indeed, is what has already been done by the Defendants. In my opinion, the contract cannot be performed specifically without interfering with the rights of the public, which I have no power, and which, if I had the power, I should not venture, to interfere with.

I am also of opinion that the fact that the contract is confirmed by the Act of Parliament I have referred to does not affect this question. The effect of the Act is only to bind the company to the extent that Mr. *Lindsay* and Sir *William Clay* were bound, and not to give a statutory force to the contract, if in other respects it were defective. That being so, I am of opinion that I cannot make the decree with respect to the road and bridge, as asked by the Plaintiff.

What is the proper course for me to adopt in this state of circumstances, and after having come to this conclusion, is a matter of which I shall postpone the statement until I have noticed the other subjects of complaint brought forward by the Plaintiff, and the relief he seeks in respect of them, which have a material bearing upon the subject, as they are all matters arising out of the contract, and one of them, viz., the complaint as to the level crossings, also arises out of the raising of the level of the railway. In fact, one ground of the complaint is that the railway is higher than it ought to be, and

that the company ought to be compelled to lower the level of the railway; and in the bill and in the argument repeated reference has been made to the company having laid the rails above the level stipulated for in the agreement; but in truth there is no stipulation on the subject in the agreement, nor does either the agreement or any part of the correspondence prior to the filing of the bill, that I have been able to discover, refer to any agreement, written or parol, as to the precise level at which the railway was to be made. The first agreement unquestionably contemplated the railway passing much higher, and going over the lodge road, and the subsequent agreement contemplated the railway passing at a much lower level, and the lodge road passing over the railway; but I find nowhere any stipulation between the parties as to the level at which the railway should be made, other than that which is contained in the recital in the second agreement. This, it is insisted, is an agreement to that effect by the company; but it is at most only the recital of an agreement, which nowhere appears to have been entered into. The deed contains no covenant or agreement by the company to make the line according to the gradient referred to in the recital; the covenants relate to the bridge and the road, and contain these words: "The bridge to be constructed so as to interfere with and obstruct the present lodge road as little as possible consistent with the deviation thereof hereby authorized, and to make the continuation thereof over the railway as convenient as possible, having regard to the nature of the mode of carrying the same over by a bridge." I am bound to conclude, and indeed the evidence also leads me to the same result, that the level selected for the railway is that best suited for the convenience and safety of the public; and if so, consistently with that fact the company have complied with the words I have just read, although they have not adhered to the line specified in the plan annexed to the agreement. I cannot lower the railway to give the Plaintiff a less curved approach to his house; neither can I lower the railway in order to change the level of the crossing.

With regard to the other subjects of complaint, the evidence is not very distinct; it is admitted that they originally formed no part of the real subjects of complaint; and they would

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probably have been easily arranged without litigation if the dispute respecting the lodge road could have been settled. It is also to be observed that these complaints were not made in the pleadings until the final re-amendment of the bill. The failure of the company in these respects would probably have been easily settled, or, if not, would have been measured by damages, to be recovered by the Plaintiff in an action, had this suit not been instituted, and had the company persisted in refusing to do what was right in this respect. It is also to be observed that by a clause in the agreement it is provided, that any dispute which shall arise respecting the formation of the arches, roads, crossings, approaches, culverts, gates, or other accommodation works, thereby agreed to be made, or any of them, or in anywise relating thereto, shall be settled and provided for as directed by the *Railways Clauses Act*. It is said that this clause is ineffectual, because the magistrate who is appointed by the *Railways Clauses Act* would have no authority under the Act, except in the case where there was no contract, and that this agreement could not give him authority. But, assuming this to be correct, the clause points out a ready mode by which the authority might be given as between the parties themselves, and the matter might be settled by reference to a magistrate, if one could be found who would consent to act as umpire to settle the difference. My opinion is that this class of complaints, if they stood alone, would not have been sufficient to have sustained a bill for specific performance of the contract; they were trivial matters to be settled amicably or to be compensated for by damages in an action, if all the substantial parts of the contract were performed.

The only other question in dispute is as to the form of the conveyance to be executed by the Plaintiff to the company. The Plaintiff insists that the conveyance shall contain a covenant by the company to do and continue to do the acts they agreed to do by the agreements. But in this respect I think the company is in the right. With respect to all excepting the continuing covenants, one of two things is certain, either the covenants have been performed, or they cannot now be performed otherwise than in the manner they have been performed; in either

case, a covenant to perform these acts would be unfit and misplaced in the conveyance. As regards any future acts which the company have covenanted to perform, such as keeping the bridge in repair, it does not appear to me that the Plaintiff, who has the covenant already under the seal of the company, would be in the slightest degree benefited by having the covenant repeated over again in the conveyance made by him to the company, or that this would be a proper place for it.

I have hitherto spoken of the Plaintiff, and have treated the suit as that of Mr. *Raphael* alone, who was the party to the contract. It is true he has since sold and conveyed the estate to his co-Plaintiffs, Mr. *Barnett* and Mr. *Birch*; but I do not think that this transfer of interest affects the question in any respect, either in favour of the Plaintiffs or of the Defendants. In my opinion it leaves the matter exactly as if no such transfer had been made, and I only refer to it to shew that it has not been overlooked by me.

In this state of things I considered at the outset, and I still think, after a thorough investigation of the matters in difference, that it would have been prudent if the Plaintiffs had abated somewhat of their claims against the Defendants in consequence of the suggestion I made, and I regret to have found how very useless it was to make that suggestion. I have already stated the reasons which forbid me to compel the specific performance of the agreement as to the lodge road by altering the level of the railway, and also why I cannot substitute a new one, that is, a new bridge and road, and entangle myself in negotiations for the price of land, according to the suggestion I made at the close of the argument, and which could only be successfully worked out provided it were *bonâ fide* adopted by both sides in a spirit of conciliation, of which, as I have said, I see little prospect. At the same time, the company unquestionably have not performed their contract, and ought to make good to the Plaintiffs all that they have lost, and to compensate them for all the injury sustained by reason of such non-performance, whatever that may be. But, in my opinion, this is a case in which the Plaintiffs can only have damages, and the measure of these damages is the injury sustained by them. This relief is not asked for by the bill; there is

M. R. 1866 RAPHAEL v. THAMES VALLEY RAILWAY CO.

little direct evidence upon the subject, and I should be making a decree resisted both by the Plaintiffs and the Defendants if I were to direct an inquiry in chambers as to the amount of damages sustained by the Plaintiffs by reason of the breach of covenant by the Defendants; moreover, I am satisfied that this would be best ascertained by a jury, who might if necessary have a view of the spot. In this state of things, I am of opinion that the proper decree for me to make is to dismiss the bill without costs, but without prejudice to the Plaintiffs bringing such action or actions for breach of the covenants contained in the contract as they may be advised. If, however, the Plaintiffs desire it and ask for it, I will direct an inquiry as to what damage has been sustained by reason of the breach of the covenants contained in the Indenture of the 15th of July, 1863, by the Defendants, and at the same time direct that the conveyance to be executed between the parties shall be settled in chambers in case the parties differ. In neither case shall I give any costs up to and including the hearing. I do not mean that the request of the Plaintiffs to take an inquiry as to damages shall in any respect prejudice their right to appeal from the decree I now pronounce, for my decision is unquestionably an adverse decree to them, who ask for specific performance and nothing else, which I refuse to decree; but I mean that if on appeal my decision should be affirmed, it should be stated that I thought it right that the Plaintiffs should have such an inquiry if they thought fit to ask for it, and it might then be obtained if the Lords Justices should think fit to award it.

Solicitors for the Plaintiffs: Messrs. *W. & H. P. Sharp.*

Solicitors for the Defendants: Messrs. *Hargrove, Fowler, & Blunt.*

In re LONDON COTTON COMPANY.

V.-C. W.
1866
March 8, 12, 13.

Winding-up—Company—Companies Act, 1862, *ss.* 85, 87, 163—*Proceedings by creditors—Execution—Leave to continue proceedings—Fraudulent preference.*

Notwithstanding the 163rd section of the *Companies Act*, 1862, which enacts that "where any company is being wound up by or subject to the supervision of the Court, any execution put in force against the estate or effects of the company shall be void to all intents," the Court has power, under the 87th section, where a winding-up order has been made, to give leave to a creditor to proceed with an execution.

Semble, the 163rd section has reference only to cases of fraudulent preference.

Where a creditor in an action against a company registered under the Act of 1862, had, before a Petition for winding up the company was presented, recovered judgment, and sued out a writ of execution, which was in the sheriff's hands, and would have been executed but for resistance made to the sheriff's officer, the Court, after making the winding-up order, in the exercise of its discretion, dissolved an injunction, restraining the execution, which had been obtained on motion *ex parte* by the petitioning creditor immediately after the presentation of the Petition, and gave leave to put in force the execution.

THIS was a motion by a creditor of the company for the dissolution of an injunction granted on the 21st of February last, restraining the creditor, until the hearing of a Petition for the winding-up of the company, from taking any further proceedings in two actions which had been commenced by him; and that, notwithstanding the presentation of such Petition, and any order to be made thereon, the creditor might have leave to put in force the executions which had been sued out by him against the company.

The injunction had been moved for *ex parte*.

This motion was opened on the 8th, and was directed to stand over till the 12th, and come on with the hearing of the winding-up Petition, in order to give the creditor time to answer the affidavit.

It now appeared that on the 5th of February, 1866, the creditor, *John M. Hazelgrove*, recovered two judgments against the company in the Court of Exchequer for two sums of £362 9*d*.

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and £297 11*s.* 6*d.*; and that on the 14th of February he issued writs of *fi. fa.* on both the judgments into the city of *London* and the county of *Surrey* to levy the amounts respectively; that the sheriff accordingly levied on the goods of the company in the city, and sold the same by public auction on the 19th of February, 1866, realizing about £200; but the creditor was informed by the Sheriff of *Surrey* that some person or persons in possession of the company's works in *King Street, East Street, Walworth,* refused to admit his officer on the premises.

March 12. Mr. *Amphlett,* Q.C., and Mr. *Buchanan,* for the Petitioner, now asked for the winding-up order.

Mr. *Roxburgh,* for the company, said the application could not be resisted.

The order was made.

Mr. *Amphlett* then asked for the appointment of an official liquidator.

Mr. *Downing Bruce,* for certain shareholders, opposed.

The Vice-Chancellor said that, under the 85th section, he must appoint provisionally the person named to be official liquidator.

Mr. *Daniel,* Q.C., and Mr. *E. Ward,* for the creditor, then opened the motion:—

The only question is whether, under the circumstances, and having regard to the sections of the *Companies Act,* 1862, this Court will think it right to interfere.

By the 84th section, it is declared that the winding-up of a company shall be deemed to commence at the time of the presentation of the Petition for the winding-up. By the 85th section, the Court may, at any time after the presentation of a Petition for winding up, and before making an order for winding up, upon the application of the company or any creditor, restrain further pro-

ceedings in any action against the company, upon such terms as the Court thinks fit. By the 87th section, when an order has been made for winding up a company, "no suit, action, or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court, and subject to such terms as the Court may impose." By section 94, the official liquidator is to take into his custody, or under his control, all the property, effects, and things in actions to which the company is, or appears to be, entitled. Section 163 provides that "where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution, put in force against the estate or effects of the company, after the commencement of the winding-up, shall be void to all intents."

The creditor, in this case, ought not to be restrained from reaping the fruits of his judgments already obtained: *In re The Great Ship Company* (1). The phrase "putting in force," in the 163rd section, cannot be meant to apply to an execution already issued and attempted to be put in force.

[They also referred to *In re Exhall Mining Company* (2).]

Mr. *Amphlett*, Q.C., and Mr. *Buchanan*, *contrà* :—

The language of the 163rd section is explicit, and admits of no exception. The Court itself has no power, after a winding-up, to permit a creditor to put in force an execution. All the 87th section means is that proceedings may be continued by leave of the Court up to recovery of judgment, but no further. In the *Great Ship Company's Case*, the sheriff was actually in possession of the property.

[They also cited *In re The Waterloo Assurance Company* (3).]

Mr. *Roxburgh*, for the company :—

The creditor asks the Court to be allowed to do that very thing which the statute declares shall be void if done. There are no words about the leave of the Court in the 163rd section. If this execution be allowed to proceed, the principle and object of a

(1) 12 W. R. 139. (2) 4 N. R. 127.
(3) 11 W. R. 159.

V.-C. W. 1866 *In re* London Cotton Company.

winding-up, namely, that the effects are to be distributed *pari passu* amongst the creditors, will be sacrificed. In the case of *The Exhall Mining Company*, the distress had been actually levied.

Sir W. Page Wood, V.C.:—

I think this case is entirely governed by the authority of *In re The Great Ship Company*, so far as the views of the Lords Justices ought to guide me, differing, as they did, from the Master of the Rolls. I cannot say I am not bound by observations coming from such an authority; nor, looking at the Act of Parliament, can I say that the view is so unreasonable as that I ought not to adopt it.

Originally a winding-up order did not touch the rights of creditors, further than that they were obliged to come in and prove their debts. Afterwards a very great interference took place with their rights; but even since the Acts of 1857 and 1858, creditors are not placed in the same situation, as far as their rights are concerned, as creditors in bankruptcy. In many respects, no doubt, as in the choice of assignees and other matters, creditors under a winding-up order are deprived of the advantages which creditors enjoy under a bankruptcy; and I cannot bring myself to believe that the Legislature intended to assimilate a winding-up to a bankruptcy in all respects.

The important clause is that which is framed to protect the body of creditors from any fraudulent act on the part of any one creditor. The 163rd section says, that where a company is being wound up, any execution put in force against the estate or effects of the company shall be void to all intents. But that section must be considered as subservient to the other clauses of the statute. The Court is, by the 87th section, authorized to allow any proceedings to go on. These two clauses are perfectly consistent, and may be read together. The effect of them is to put the creditor to the necessity of coming to the Court and asking for leave; and upon the Court giving him leave, he is at liberty to proceed and to take the fruits of his judgment.

According to Mr. *Amphlett's* argument, the creditor has the

right of proceeding indeed, but it is a very meagre one, for he is not to be at liberty to proceed to execution.

The history of this clause may be described as follows: By the original scheme of procedure under the old Acts, the creditor was not allowed to go on without first having come in and proved his debt. By the subsequent Acts of 1857 and 1858, after a company had been adjudicated bankrupt, or a creditors' representative appointed, no creditor was allowed to proceed without leave of the Court.

So far as this question of the leave of the Court is concerned, I am relieved from the difficulty of appearing to differ from the Master of the Rolls (which in other respects I should certainly not have done without further argument, had it not been for the observations of the Lords Justices), for his Lordship appears to have taken the same view in *The Waterloo Assurance Company's Case* (1), where he says, "If the creditor desired to proceed to execution, an application upon notice ought to have been made by him to the Court for leave to do so." The Master of the Rolls clearly, therefore, entertained no notion that he had not the power to give leave to the creditor to proceed, if he had thought fit so to do. He adds, that he "does not encourage the creditor to make such an application;" in other words, expressing a strong opinion that in that particular case he should not have allowed the creditor to proceed.

In *The Great Ship Company's Case* (2) the Master of the Rolls gives his reasons at length. He conceives the object of the Act to have been to protect the body of creditors from inequality in the division of assets arising from priority having been gained by a diligent creditor. That is precisely the view which the Lords Justices dissented from. Lord Justice *Turner* says (3): "The question is, what are the circumstances which ought to guide the Court in the exercise of this discretion? In my opinion, the Court is bound to look at the legal rights of the parties, and to the interests, not of one class only, but of each particular class of creditors who may be affected by its decision. There is nothing in this Act to give to general creditors any rights to have their interests consulted in preference to the interests of particular creditors whose

(1) 11 W. R. 160. (2) 12 W. R. 117. (3) 12 W. R. 139.

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case comes before the Court. It is the duty of the Court to hold an even hand over the interests of all parties. I think the section was meant with the view to meet cases in which there might have been unfair proceedings on the part of creditors. Above all, the Court is bound, in considering the question as to the exercise of its discretion, to see what its duty would have been if the order to wind up had been actually made, and an application had been made by a creditor for leave to issue execution." The Lord Justice therefore entertained no notion that the 85th section is repealed by the 163rd. Lord Justice *Knight Bruce* intimated a doubt whether an action which had been concluded by judgment and execution, nothing remaining to be done, except to raise money by the sale of the goods, was a "proceeding" within the 201st section. He also doubted whether an *ex parte* injunction could be granted under the terms of the section. But he nevertheless thought there was no sufficient state of circumstances, in the facts of the case, to induce the Court to interfere with a just creditor in lawful possession under an execution, there having been no application to wind up until some days after possession had been taken by the sheriff.

9 Eq 371

If the 163rd and subsequent sections on the subject of fraudulent preference are examined, it will be found that the Act contemplates certain acts of fraud which sometimes take place in bankruptcy, and protects the creditors against those acts, and also against a race among creditors who may be pulling the estate to pieces. In such a case, the Act says, the proceedings shall be void.

In this case where the whole matter has been brought before the Court, and where I find a *bonâ fide* action commenced, pleas put in to which there is no traverse, judgment recovered, and a writ sued out and in the hands of the sheriff, who is only stopped by having the door shut in his face, I think I should be depriving this gentleman of his just rights if I were to consider, as the Master of the Rolls is reported to have done in *The Great Ship Company's Case* (1), that, by the 87th section, the winding-up order operates as an absolute injunction.

This is no case of a creditor hastily snapping a judgment, and I

(1) 12 W. R. 118.

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do not think it is a case in which I ought to deprive the applicant of the fruits of his judgment.

I therefore dissolve the injunction, and give him leave, under the 87th section, to put the execution in force.

MINUTE:—Order for injunction discharged. Costs of creditor to be paid by provisional liquidator, and to be allowed to him out of the assets. Creditor to be at liberty, notwithstanding the winding-up order, to proceed with and put in force the executions sued out by him.

Solicitor for the Creditor: Mr. *A. J. Miles.*
Solicitor for the Petitioner: Mr. *Gledhill.*
Solicitor for the Company: Mr. *G. Lawrence.*

LEE *v.* ANGAS.

V.-C. W.
1866
March 22, 23.

Practice—Production of Documents—Witness—Subpœna duces tecum.

A *subpœna duces tecum* requiring a solicitor, not a party to the suit, to produce all papers, &c., relating to all dealings and transactions between his firm and the Plaintiffs or Defendants (as the case may be), for a period of thirty years, without specifying any particular documents required, is too vague, and the witness is entitled to refuse production. But if the witness, who has been served with a subpœna in this general form, admits that he has in his possession "the documents thereby required," he must produce them, and cannot insist upon being first sworn.

THIS was a motion on behalf of the Defendants, that *Mary Conyers* and *James Milnes Jennings* might be ordered to attend the Examiner and produce all accounts, &c., relating to the dealings and transactions of the firm of *Jennings & Conyers & E. D. Conyers* with the Plaintiffs, or with them and *Hannah Lee*, between 1830 and 1863; and generally, all other books, accounts, letters, papers, and documents in the possession or power of *Mary Conyers* and *J. M. Jennings*, in any way relating to the affairs and concerns of the Plaintiffs, or *Hannah Lee*, and all books, accounts, papers, and documents received by *J. M. Jennings* from *H. E. Silvester* as solicitor of *Mary Conyers*, "being the documents

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mentioned in the *subpœna duces tecum*, served upon them on the 2nd and 3rd of March, 1866, and in default thereof, that the said *Mary Conyers* and *James Milnes Jennings* may respectively stand committed, and that the said *Mary Conyers* and *J. M. Jennings* may be ordered to pay to the Defendants all the costs of this application, and also all costs occasioned to Defendants by the neglect or refusal of *Mary Conyers* and *J. M. Jennings* to produce the said documents, and the non-production thereof before the Examiner on the 8th of March instant, pursuant to the exigency of the said *subpœna duces tecum*."

The issue raised in the suit turned upon the validity of certain mortgage transactions, in which the late *Edmund Dade Conyers* had acted both for the Plaintiffs and also for parties whose interests were now represented by the Defendants. *Jennings*, the present solicitor of the Plaintiffs, and the late partner of *Conyers*, admitted having received from Mr. *Silvester*, who had for a short time acted as solicitor for *Mary Conyers*, the widow of the said *E. D. Conyers*, a box full of the papers of the late Mr. *Conyers*, many of them relating to transactions between him and the *Lees*.

The Defendants being advised that an inspection of these documents, which were not included in the Plaintiffs' affidavit as to documents, was material to their case, had applied, but without success, for an inspection of them to *Jennings*, who claimed to hold them either as Mrs. *Conyers*' solicitor, or as Mr. *Conyers*' surviving partner. In the correspondence that took place on the subject, *Jennings* had at first consented but ultimately refused to produce them, stating that he was acting under the advice of counsel. Under these circumstances the Defendants, who did not wish to call *Jennings* as a witness, served Mrs. *Conyers* with a *subpœna duces tecum* to attend before the Examiner. Mrs. *Conyers* attended before the Examiner pursuant to her subpœna, but did not bring the documents with her, on the ground, as she said, that they were not in her possession, but in that of *Jennings*.

The examination was accordingly adjourned until the 8th of March, and on the 2nd of March, a *subpœna duces tecum* was served on *Jennings*, calling upon him to appear and produce all accounts and copies, or drafts of accounts relating to the receipt of the rents of a certain farm in which the Plaintiffs

were interested, received by the late firm of *Jennings & Conyers*, between 1830 and 1863, all accounts, &c., relating to the dealings and transactions of the said firm of *Jennings & Conyers*, and the said *E. D. Conyers*, with the Plaintiffs, or either of them, or with them and *Hannah Lee* between 1830 and 1863; all copies of letters written by the said firm of *Jennings & Conyers*, and the said *E. D. Conyers* respectively, to the Plaintiffs, or either of them, between the above dates; all letters written and sent by the Plaintiffs, or either of them, to *Jennings & Conyers & E. D. Conyers*, between the above dates; all cheques and receipts, books belonging to the firm and *E. D. Conyers*, containing any entry or memorandum relating to his dealings and transactions for or on account of the Plaintiffs or *Hannah Lee*, "and all other books, accounts, letters, papers, and documents in your possession or power, in any wise relating to the affairs and concerns of the said Plaintiffs, or either of them, or the said *Hannah Lee*, and all books, accounts, letters, papers, and documents received by you from *H. E. Silvester*, as solicitor of *Mary Conyers*."

On the 8th of March *Jennings* and Mrs. *Conyers* attended the Examiner upon their subpœna. According to the note made by the Examiner, counsel for the Defendants called upon *Jennings* to produce the documents mentioned in the subpœna. *Jennings* declined to answer any question until he was sworn. The matter was thereupon referred to the Court by the Examiner, who stated his opinion that the witness ought to produce the documents, or give a valid reason for their absence, and that for that purpose he could not require to be sworn. Under these circumstances the Defendants moved for the attendance of Mrs. *Conyers* and *Jennings* before the Examiner, and production by them of the documents mentioned in the *subpœna duces tecum* served upon them on the 2nd and 3rd of March.

Jennings had filed an affidavit, in which he stated that he claimed to hold all the books, accounts, letters, papers, and documents mentioned or referred to in the subpœna of the 2nd of March in his own right, or to have a lien thereon for moneys due from the estate of the late Mr. *Conyers;* that he attended at the time and place mentioned in the subpœna and notice, and took all the books and documents required thereby, and that upon his

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declining to answer any question until he was sworn, he was not called upon to give any reason for so doing.

Mr. *H. W. Cole*, Q.C., and Mr. *E. E. Kay*, in support of the motion, contended that the form of the *subpœna duces tecum* under which *Jennings* had attended on the 8th of March was perfectly regular, and that having been called for the mere purpose of producing documents, he was bound to answer questions confined to the mere purpose of production, without requiring first to be sworn: *Griffith* v. *Ricketts* (1); *Perry* v. *Gibson* (2); *Hope* v. *Liddell* (3); *Bradshaw* v. *Bradshaw* (4); *Re the Cameron's Coalbrook Railway Company* (5). But any objection to the form of the subpœna had been waived by *Jennings*, who stated in his affidavit that he had attended with the documents referred to in the subpœna. Upon the form of the subpœna they referred to *Taylor* on Evidence (6).

Mr. *Rolt*, Q.C., and Mr. *Fry*, on behalf of *Jennings*, opposed the motion, and contended that the subpœna on which he had been summoned was too vague for the Court to act upon, inasmuch as it did not specify any particular documents which the witness was required to produce. The subpœna not being in proper form, it was immaterial that *Jennings* had brought a box of papers with him which he believed to be the papers referred to. *Jennings* had no interest in the matter, and had nothing whatever to do with the matters in dispute between the Plaintiffs and Defendants, and could not, therefore, be compulsorily called upon to ransack his books and papers for a space of thirty-three years, or rendered liable, being only a witness, to this species of bill of discovery: *The Attorney-General* v. *Wilson* (7); *Amey* v. *Long* (8).

Mr. *Cole*, Q.C., in reply, distinguished the case of the *Attorney-General* v. *Wilson*, observing that the observations relied upon, in opposition to this motion, were mere *obiter dicta*, and that the circumstances of the two cases were different. In that case the objection to producing the books mentioned in the subpœna was,

(1) 7 Hare, 299.
(2) 1 A. & E. 48.
(3) 7 D. M. & G. 331.
(4) 1 Russ. & My. 358.
(5) 25 Beav. 1.
(6) P. 963 (2nd ed.).
(7) 9 Sim. 526.
(8) 9 East, 473.

that they were partnership property—not in the individual possession of the witness—and that without the consent of his co-partners, it was not competent to him to produce them. The objection as to the subpœna being too wide in form, was taken by counsel at the bar, and had nothing to do with the real ground of decision.

SIR W. PAGE WOOD, V.C.:—

A subpœna in this general form, not for production of any document in particular, but calling upon the witness to ransack his papers for a period of thirty-three years, is too wide, being in effect a bill of discovery against a witness. There is no case to shew that Courts, either of common law or equity, will act upon a subpœna so general in form. On the other hand, there is an express decision by the Vice-Chancellor of *England*, in the *Attorney-General* v. *Wilson* (1), upon both points there raised, not only that the books required being partnership books, could not be produced without the consent of the co-partners, but also that the language of the subpœna was too general for the Court to act upon. I cannot hold that it was a mere *dictum* of the Vice-Chancellor of *England*, and the decision is founded on the best possible reason, as, if production were enforced upon a subpœna in this general form, witnesses having nothing whatever to do with the case might be subjected to a most harassing duty.

No person is to be subjected to the performance of duties not incumbent upon him by any legal or moral obligation, nor to penalties for non-compliance. I have asked in vain for any case in which such a subpœna has been enforced. Such a search as would be required would be very onerous even upon a Defendant, but in the case of a solicitor, who is not a party to the suit, he is not bound to expose himself, without receiving any reward or compensation, to the trouble and expense of searching for particulars of everything that has happened in his office for the last thirty-three years. He must speak the truth within his knowledge, but he is not bound to make this burdensome search for evidence at his own expense. With respect to the letters, and the letters only, I do find a sufficiently definite description in the subpœna.

(1) 9 Sim. 526.

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The witness, however, has himself made an affidavit in which he says that he attended at the Examiner's Office "with all the books and documents required by the subpœna." If he has got them all ready there is no reason why he should not produce them. You are entitled to ask him what documents he has with him, and to call for their production, and he is bound to answer the question without being sworn: as was decided in *Griffiths* v. *Ricketts* (1).

The order will be for Mrs. *Conyers & Jennings* to attend the Examiner at their own expense, and to bring with them, to be dealt with according to the exigencies of the subpœna, the accounts, &c. (following the words of the subpœna), *Jennings* having admitted, by his affidavit, that he had in his possession in the Examiner's Office all the books and documents mentioned in the subpœna. It is not a case for giving costs either way.

Solicitors for the Plaintiff: Messrs. *Hollings, Sharp & Ullithorne.*

Solicitor for the Defendants: Mr. *F. W. Blake.*

V.-C. W. 1866 March 12, 20.

SPARLING *v.* BRERETON.

Solicitor—Practice—Client—Qualification of Solicitor—Practising without a Certificate—6 & 7 *Vict. c.* 73; 23 & 24 *Vict. c.* 127.

9 Eq 65.

Proceedings taken on behalf of a Defendant by a solicitor who had not at the time renewed his annual certificate, will not be set aside as irregular; the right of the solicitor to recover his fees, and not the interest of the client (who is not bound to ascertain if his solicitor is duly qualified to practise), being alone affected by the want of proper qualification.

THIS was a summons adjourned from Chambers into Court upon an application on the part of the Plaintiff that the appearance entered in this cause, and all subsequent proceedings by *A. B.*, might be set aside, on the ground that at the time when the appearance was entered the said *A. B.* had not taken out an

(1) 7 Hare, 300.

annual certificate entitling him to practise as a solicitor of this Court, and that Defendant and *A. B.* might be ordered to pay the costs of the appearance and proceedings and of this application.

The name of *A. B.* appeared in the "Law List" for 1865, and between the 15th of November and the 16th of December, 1865, he bespoke his annual certificate at the Law Institution for practising as an attorney and solicitor.

By 23 & 24 Vict. c. 127, s. 22, every certificate issued between the 15th of November and 16th of December in any year shall bear date and take effect for all purposes from the 16th of November, provided it be stamped before the 16th of December. If not stamped before the 16th of December, it shall take effect, as regards the qualification to practise, on the day on which it is stamped. All certificates continue in force until the 13th of November next following, and the "Law List" shall, until the contrary be made to appear, be evidence in all the Courts that the persons named therein as attorneys, &c., holding such certificates for the current year, are attorneys, &c., holding such certificates. *A. B.* did not get his certificate stamped until the 30th of December, 1865. The appearance which it was now sought to set aside was entered by him on the 7th of December, 1865. The present summons was taken out on the 22nd of January, 1866.

In his affidavit, made upon the present application, *A. B.* attempted to explain the delay in getting his certificate stamped as follows:—

"I believed I had up to the 1st of January to do so; otherwise, had I believed or thought it necessary, I should have had the said certificate stamped previous to the 16th of December."

It appeared that what purported to be an appearance had previously been entered for the Defendant by a person who was not a solicitor. This appearance was set aside upon application by the Plaintiff, whereupon *A. B.* was instructed by the Defendant.

Mr. *Stiffe Everitt*, for the Plaintiff, contended that all proceedings taken by a solicitor, who had not taken out his certificate,

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were irregular and void, and must be set aside, there being an express prohibition by statute against an attorney or solicitor practising without being duly qualified, and a certificate being an essential part of the qualification: 6 & 7 Vict. c. 73, ss. 2, 26, 35, 36; 23 & 24 Vict. c. 127, s. 26: *Reg.* v. *Buchanan* (1); *Hawkins* v. *Edwards* (2); —— v. *Sexton* (3); *The Duke of Brunswick's Case* (4).

The Plaintiff, for his own protection and to avoid any repudiation of the proceedings by the Defendant, was entitled to have the irregularity set right, and an appearance entered by a properly qualified solicitor.

Mr. *T. A. Roberts*, for the Defendant, contended that proceedings taken by a solicitor practising without a certificate were not irregular, although the solicitor could not sue for or recover fees for business done while he was not properly qualified, and might be subjected to certain penalties. But the client, who was not bound to inquire into the qualification of the person employed by him as his solicitor, was not to be affected by any irregularity in the qualification, or by the omission of the solicitor to renew his certificate within the proper time, and the distinction between an omission to renew the certificate, and practising without a certificate *ab initio*, was marked in some of the cases: *Re Hodgson & Ross* (5); *Reader* v. *Bloom* (6); *Smith* v. *Wilson* (7); *Hilleary* v. *Hungate* (8); *Glynn* v. *Hutchinson* (9); *Hodkinson* v. *Mayer* (10).

[The VICE-CHANCELLOR:—Would not the Defendant be entitled afterwards to say that everything done by this solicitor, while he was acting without a certificate, was irregular and could not bind him?]

The client could not treat the proceedings as irregular. It would be a mere question of retainer. But even if the Plaintiff was entitled to object to the appearance as irregular, the applica-

(1) 8 Q. B. 883.
(2) 4 Moore, 603.
(3) 1 Dowl. P. C. 180.
(4) 19 L. J. (Ex.) 112; 4 Ex. 492.
(5) 3 Ad. & E. 224.
(6) 10 Moore, 261.
(7) 1 Dowl. P. C. 545.
(8) 3 Dowl. P. C. 56.
(9) Ibid. 529.
(10) 6 Ad. & E. 194.

tion was too late, as it was not made until the 22nd of January, after the solicitor had got his certificate stamped.

Mr. *Stiffe Everitt*, in reply.

March 20. SIR W. PAGE WOOD, V.C.:—

The cases at common law seem to shew that although great difficulties are thrown in the way of any recovery of his costs by a solicitor who acts for a client without being duly qualified, the proceedings themselves are not void. It would be most mischievous, indeed, if persons, without any power of informing themselves on the subject, should be held liable for the consequences of any irregularity in the qualification of their solicitor. As against third parties, the acts of such a person acting as solicitor are valid and binding upon the client on whose behalf they are done. A client who might ascertain by inquiry that his solicitor was on the roll, would have no means of finding out if his certificate was taken out and stamped at the proper time. I do not, therefore, think myself justified in interfering, because, at the time when the appearance which it is sought to vacate was entered, the solicitor had no certificate. The result of the authorities is thus stated by *Erle*, J., in *Holdgate* v. *Slight* (1):—"It seems to me, therefore, that an attorney, though uncertificated, may do acts in his capacity of attorney, but that the result will be that he will, in such case, lose his fees." The name of the solicitor in this case was to be found in the "Law List" for 1865, which, by the 23 & 24 Vict. c. 127, is *primâ facie* evidence that he is duly qualified. According to the older statutes (before 6 & 7 Vict. c. 73), an attorney who did not take out his certificate for one whole year required re-admission, his admission being rendered void and himself incapable of practising. But under the new law (since 6 & 7 Vict. c. 73), an attorney neglecting to procure a certificate does not require re-admission. His name remains on the roll, but he is incapable of recovering any fees for business done by him whilst he shall have been acting without a certificate. I should be injuring both Plaintiffs and Defendants if I were to hold that the absence of a certificate had the effect of invalidating

(1) 21 L. J. (Q. B.) 74.

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all proceedings taken in the suit. I must refuse the application, and, as the certificate was stamped before this summons was taken out, I must refuse it with costs.

Solicitors for the Plaintiff: Messrs. *Hill & Hoyle.*
Solicitor for the Defendant: Mr. *Andrews.*

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In re JEFFERY'S TRUSTS.

Will—Legacy, Specific or Demonstrative—Interest—Dividend.

Testator bequeathed as follows: "The pink coupons in the pigeon-hole are for £3666, send those to *Irving & Slade*" (brokers), "and he is to pay to *E. T.* £2500, the rest for the Archdeacon *G.* for *B.* and *E.*"

Testator died on the 13th of September, 1864. Certificates for £3666 13*s.* 4*d.* *Midland Railway* Stock were found. On the 2nd of November, 1864, an administrator was appointed, but the stock was not sold till the 22nd of November, 1865. Meanwhile a dividend had accrued:—

Held, that the gift of £2500 to *E. T.* was a specific legacy, and that *E. T.* was entitled to a share of dividend, up to the time of sale, accruing on that portion of the stock which, at the death of the testator, would have been requisite to realize £2500.

A TESTATOR made the following bequest:—

"The pink coupons in the pigeon-hole are for £3666; send those to *Irving & Slade* of 1, *Copthall Court*, and he is to pay to *Ellen Tomkins* £2500, the rest for the Archdeacon *Giles*, for *Bess* and *Edie*."

After the testator's death, which occurred on 13th September, 1864, six share certificates, coloured pink, for *Midland Railway* Stock, of various denominations, amounting in the whole to £3666 13*s.* 4*d.* stock, were found in a pigeon-hole. *Irving & Slade* were stock and share brokers.

Administration, with the will annexed, was granted on the 2nd of November, 1864, and on the 22nd of November, 1865, the administrator sold the stock for £3233 15*s.* A dividend of £163 6*s.* 1*d.* had been received, and the administrator had paid these two sums amounting (less costs) to £3350 6*s.* 11*d.* into Court.

The sole question was whether *Ellen Tomkins* was entitled to any portion of the dividend.

Mr. *Alfred Bailey* for the Petitioners, the persons termed *Bess* and *Edie* :—

The gift of the £2500 is a demonstrative legacy, and the legatee takes nothing beyond the legacy, with interest at £4 per cent. from one year after the testator's decease: *Pearson* v. *Pearson* (1).

The present case is distinguishable from *Page* v. *Leapingwell* (2) and that class of cases. In *Page* v. *Leapingwell*, which is referred to and commented on in *Tatham* v. *Drummond* (3), the testator directed real and personal estate to be sold, but *not for less* than £10,000; he then, out of the proceeds, gave legacies amounting together to £7800, and the *overplus moneys* arising from the sale to A. The estates failed to realize £10,000, and Lord *Eldon*, on the ground that the testator contemplated a certain overplus, held all the legacies to be specific, and that they all abated together. That was reading the word "overplus" in something other than its ordinary meaning. In this case there is not a direction to sell the whole fund, but only a direction to raise and pay £2500, and a gift of "the rest" to the Petitioners. The Testator could not have contemplated a certain surplus, for he did not know how much would be necessary to raise the £2500. This was not, therefore, a gift of an aliquot part, but of a defined amount, and "the rest" includes everything beyond the £2500.

Mr. *Charles Spencer Perceval*, for the Administrator.

Mr. *Robinson*, for *Ellen Tomkins* :—

This is a specific fund, dealt with by the testator for specific purposes. The word "he" is a mistake for "they," meaning the brokers; it would be very far-fetched to say that "he" means the administrator. This is not the case of next of kin claiming as against a legatee. *Ellen Tomkins* has the same rights as the Petitioners; only in her case the testator has defined the particular amount she has to take, in the case of the Petitioners it is an amount ascertainable but not ascertained.

(1) 1 Sch. & Lef. 10. (2) 18 Ves. 463.
(3) 2 H. & M. 265.

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[The VICE-CHANCELLOR:—Do you understand the word "he" to signify an agent or a trustee? If it means a mere agent, nothing passes; if a trustee, there should have been an immediate sale.]

Our view is that Messrs. *Irving & Slade* were trustees, informally appointed.

Mr. *Bailey*, in reply.

SIR W. PAGE WOOD, V.C., after stating the question and the terms of the bequest, continued:—

In the first place, I think "he" must mean "they;" I cannot hold it to mean the administrator. If this be simply a demonstrative legacy it will be in the position of an ordinary legacy, and will carry interest. If, on the other hand, it be specific, to be divided between two parties, then it falls within the decision in *Page* v. *Leapingwell* (1). Now it is plain there is to be a specific gift of these coupons; of £2500 to *A.*, and the rest to *B.* Then what was the administrator's duty? It was his duty as soon as he received the fund to send it to the brokers for sale. The consequences of his delay cannot affect either one *cestui que trust* or the other.

It cannot be held that because a specific chattel is directed to be divided, part to go to one person, and the rest to another, that you have there a demonstrative legacy. It appears to me that if these pink coupons are not sold, there will be no performance of his duty by the administrator, inasmuch as the only provision for *Ellen Tomkins* is out of the proceeds. I think that is the true construction.

If that be so, this is a specific legacy; the administrator must be taken to have assented to the legacy, by his having paid the dividend into Court. It ought then to be divided in these shares. This lady must take £2500, and the produce up to the time of sale of such part of the stock as would have produced this amount.

The declaration will be, that, according to the true construction of the will, the coupons for the £3666 stock were given to *Irving*

(1) 18 Ves. 463.

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& Slade, upon trust to sell and pay £2500 sterling out of the produce of such sale to *Ellen Tomkins*, and the residue of such produce to Archdeacon *Giles* in trust for the Petitioners. Also, that *Ellen Tomkins* is entitled to the dividend accrued upon so much of the respective stocks (the same to be duly apportioned) as would be required upon sale at the death of the testator to produce the sum of £2500; the amount to be verified by affidavit; and then order payment to *Ellen Tomkins* of such proportionate part of all dividends up to the time of sale; with consequential directions; the costs to be taxed and apportioned.

Solicitors for the Petitioners: Messrs. *Bailey, Shaw, Smith, & Bailey.*

Solicitors for the Respondent: Messrs. *Reed & Phelps.*

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March 14, 16.

Information—Nuisance—Appeal at law pending—Injunction—Delay—Attorney-General, Laches by—Commencement of Injunction.

The Defendants, a Canal Company, incorporated by Act of Parliament, in 1772, and empowered by their Act to take water for the purposes of their undertaking from a stream then pure, but since become polluted by the proximity of numerous dwellings, was, with its lessees (whose lease was about to expire), indicted for a nuisance, in allowing the foul water to stagnate in the basin of their canal; and judgment for the Crown was entered up against the lessees, who, at the instance of the company, had given notice of appeal.

Upon an information being filed against the company and their lessees, the company, by their answer, admitting the polluted state of the water, but insisting on a right to use it however foul, and saying they should probably continue to draw the water into their canal upon the expiration of the lease in April, 1866:—

Held, that, the Court being of opinion that the decision at law was correct, the fact of an appeal pending at law was no bar to an injunction, though it might influence the decision of the Court as to the date at which the injunction should commence.

Held, further, that it was no answer to the prayer for an injunction to say that the company did not pollute the water, they having the power to draw it or not into their canal, as they pleased;

4 Ch 151,
5 Ch 590.
6 Eq Ca
197

For further proceedings see Re Bradford Waterworks Co 9 Eq 86 12 Ch. 10 Eq 331, -8,

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Nor to say that the informants might be left to their legal remedies; and case distinguished from *Wood* v. *Sutcliffe* (1);

Nor to say that by restraining the company, a worse nuisance would be created in the stream.

Delay may be a ground of defence to an information, but there are instances in which neither delay nor *laches* can be imputed to the Attorney-General, where it might have been imputed to an individual Plaintiff.

It was further *held* no answer to the prayer for injunction to say that the lessees were the active offenders, and not the company, inasmuch as the company had set up their rights by their answer: nor that the company might be obliged to close their canal, and expose themselves to an indictment on that ground: and

Injunction ordered; to commence eight months after the date of the decree.

THIS was an information by the Attorney-General at the relation of *George Bankart*, merchant, *John Ingham*, dyer, and *John Cooke*, sharebroker, inhabitants of *Bradford*, *Yorkshire*, for an injunction to restrain the Defendants, the *Company of Proprietors of the Bradford Navigation*, and their lessees, *Jeremiah Crowther*, and *Samuel Dixon*, "from diverting into their canal, or allowing to pass into the same, or collecting, or keeping, or continuing therein, any filth, sewage, or polluted matter or water, so as to be a public nuisance."

The Defendants were incorporated by an Act of the 11 Geo. III. whereby they were empowered to make a navigable cut or canal from a bridge in *Bradford*, called *Hoppy Bridge*, to join the *Leeds* and *Liverpool* Canal at a place called *Windhill* (a distance of about three miles); and were also empowered to supply the canal with water from such springs, soughs, brooks, drains, streams, and watercourses running into a brook called *Bowling Mill Beck*, as should be found within the distance of 2000 yards of *Hoppy Bridge*.

The canal was opened for traffic in 1774. The head of the canal at *Hoppy Bridge* forms a basin into which supplies of water are brought for the purposes of the navigation; and the length of the canal from this basin to the first lock, called *Upper Spinkwell Lock*, is about three quarters of a mile, lying northwards through the townships of *Bradford* and *Bolton*, in a valley near the course of a stream called the *Bradford Beck*, which flows in a northerly direction, a little to the west of the canal.

(1) 2 Sim. (N. S.) 163.

The *Bradford Beck* is the principal stream of water flowing through *Bradford*. *Bowling Mill Beck*, mentioned in the Act, unites with *Bradford Beck* at a point about 350 yards above *Hoppy Bridge*.

Before 1802 the company erected a dam across the *Bradford Beck* and made upon the stones of the dam a culvert out of the *Beck* into the basin at *Hoppy Bridge*, and had ever since diverted the water, as they required it, into the basin. When the canal was constructed, there were several buildings and public streets near the basin, but the part of the canal which lies between the basin and *Spinkwell Lock* was then for the most part in open fields. During late years great numbers of private residences have been erected in roads running in the same direction as the canal, at distances from it of about 100, 500, and 600 yards.

The information alleged that during the last thirty or forty years, the town of *Bradford* had greatly increased in the neighbourhood of the *Bowling Mill Beck* and *Bradford Beck*, and a great number of drains and sewers had been made to empty themselves into these two streams, so that the water with which the canal was supplied, which originally was free from any serious impurity, was now extemely impure, and loaded with foul and feculent matter; in short, that *Bradford Beck*, at the point where water was turned from it into the canal, was an open sewer. *Bradford Beck* itself has a rapid fall, and, after rain, is flooded; so that, although the water is impure, the information alleged that no deposit of an offensive kind takes place. The water in the canal, on the other hand, was, for all practical purposes, stagnant; and as there was no flow of water, a deposit of mud, composed chiefly of sewage, had been formed, which, when disturbed by passing boats, gave out unwholesome and offensive gases.

On the 10th of August, 1864, an indictment was preferred at the Leeds assizes against the company, and their lessees, *Crowther* and *Dixon*, for causing a public nuisance, and a true bill was returned. The indictment, having been removed by *certiorari* into the Queen's Bench, came on for hearing at the Spring assizes at *Leeds*, in March, 1865, and a verdict for the Crown was returned by consent, subject to a special case. This was argued at *Westminster* on the 10th of June, and judgment was directed to be

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entered up for the Crown against *Crowther* and *Dixon*, who had given notice of appeal. It appeared that the lessees were proceeding under an indemnity from the company.

The information was filed on the 21st of June, 1865; and the lease would expire in April, 1866.

On the 22nd of July the injunction was moved for, and the motion was ordered to stand to the second seal in Michaelmas Term, upon the Defendants undertaking to cleanse the basin of the canal from time to time by means of flushing.

The Defendants, the company, by their answer, filed in November, 1865 (paragraph 12), admitted that the water which their lessees drew from the *Bradford Beck* into their basin reached it in a very polluted state. They said that in the *Beck* it was loaded with animal and other filth, but that the water with which the canal was supplied from the *Beck* passed through a culvert which had feeding cloughs or shuttles at its mouth, and that a perforated iron screen was placed in front of these feeding cloughs or shuttles, and by these means the larger description of refuse which came down the *Beck* was excluded from the canal and turned down the *Beck*. In addition to this, boards had been placed at the canal end of this culvert from the *Beck*, at a spot called *The Little Cut*, so as to form a receptacle or sinking pond, in which the mud settled as the water flowed into the canal, and this mud was prevented from entering the canal. They admitted that the canal was, in consequence of the state of the water in the *Beck*, rendered less pure than it would otherwise be, and to some extent offensive.

The 18th paragraph of the answer was as follows: "We insist that the company are entitled to use the water of the *Bradford Beck* for supplying their canal, and that without regard to such water being so foul that when so used it creates a public nuisance; and that such nuisance is legalized by the Act of Parliament incorporating the company. The company do not threaten to continue, but we think it probable they will continue, to supply the canal with water from the *Bradford Beck* upon the expiration of the demise to the Defendants *Crowther* and *Dixon*."

They further submitted that the Corporation of *Bradford* were responsible for the nuisance, if any existed, and that as the in-

11 Reported 6 Beav. 631: 10 Jur. N.S. 766

formant might, by taking proper proceedings, compel the corporation to cleanse the *Beck*, which, if done, would abate the alleged nuisance, he was not entitled to the relief he asked.

Later in the same month the Defendant *Crowther* filed an affidavit from which it appeared that since the 22nd of July, the canal had been flushed eight times. It took on an average about forty-eight hours to refill the basin. An iron screen perforated with small holes had been placed before the entrance to the culvert. The state of the water in the *Beck* was such that this had to be cleaned several times in a day with a brush to prevent the holes being stopped up. The Plaintiff's witnesses deposed that the effect of flushing the canal was that for a few hours the stench was most intense, but when the canal was again filled with water, the nuisance was mitigated for three or four days, after which it gradually increased until it became as bad as ever.

Some sewerage works for the town of *Bradford* had been commenced, but it would take five or six more years to complete them. The borough surveyor deposed that the effect of the new sewers in his opinion would be to diminish the quantity of water in the *Beck*, but not to improve its quality to any appreciable extent, and that the Canal Company would not then be able to change the water as often as they could now.

The *Attorney-General* (Sir *R. Palmer*), Mr. *G. M. Giffard*, Q.C., and Mr. *H. Cadman Jones*, for the information.

Mr. *Rolt*, Q.C., Mr. *Amphlett*, Q.C., and Mr. *John Pearson*, for the Defendants:—

An injunction in this case will be useless, for turning the water down the *Beck* will not lessen the nuisance. The Court will not interfere when no benefit can result to anybody.

The nuisance has been as bad as it is now for twenty years past. If it is a wrong, an injunction might have been obtained twenty years ago; and delay is a bar as much against the *Attorney-General* as anyone else.

The judgment of the Court of Queen's Bench is under appeal.

The Court has decided that the Company have done no wrong. It is quite new to ask for an injunction against reversioners.

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As to the lessees, the Court has said that we are guilty of creating a nuisance because we do not take active steps to shut the water out of the canal. It cannot be said that we actively take the water, because, after sometimes shutting the water out of the canal, we let it in again. The water flows in of itself by an act which was complete in the last century. The Court will not grant a mandatory injunction in a case where it never at any time could have granted a preventive one.

It is impossible here to restore the parties to their original position. We have gone on for a number of years on the faith of the public acquiescing.

In the view of a Court of equity, the source of the nuisance is important. We do not foul the water: the public themselves, who complain, send it foul to us; they are the parties in fault. It is the duty of the Corporation to cleanse the *Beck*. The Attorney-General should have filed an information, or applied for a *mandamus* against them.

There is an adequate remedy at law.

An injunction would interfere with the *Aire & Calder Navigation*, and expose us to an indictment on that ground; would also throw a multitude of people out of employment, and do great injury to trade. For this reason the Court never stops a public highway.

At the trial the Court said it is no answer to an indictment to say, others are committing as great a nuisance, but Justice *Blackburn* said, "If you shew that although you have committed this nuisance, others are committing an equal nuisance, and no material harm to the public is done, that may make a serious difference in the amount of the penalty." That argument applies to an application for an injunction.

They cited *Lawrence* v. *Austin* (1); *Durell* v. *Pritchard* (2); *Curriers Company* v. *Corbett* (3); *Deere* v. *Guest* (4); *Wood* v. *Sutcliffe* (5); *Attorney-General* v. *Johnson* (6); *Attorney-General* v. *Cleaver* (7); *Wicks* v. *Hunt* (8); *Swaine* v. *Great Northern Railway*

(1) 13 W. R. 981.
(2) Ibid.; S. C. on app., Law Rep. 1 Ch. 244, 250.
(3) 13 W. R. 1056.
(4) 1 My. & Cr. 516.
(5) 2 Sim. (N. S.) 163.
(6) 2 Wils. C. C. 87.
(7) 18 Ves. 211.
(8) Joh. 372.

Company (1); *Attorney-General* v. *Sheffield Gas Consumers Company* (2).

[The VICE-CHANCELLOR said that if the judgment of the Queen's Bench stood, the relators would of course be entitled to the injunction; but there would be inconvenience attending any sudden action. If there was a *bonâ fide* intention of appealing, he did not see how he could interfere in the course of the present year.]

The *Attorney-General*, in reply:—

The allegation of inconvenience comes from those who say the effect of the injunction will be to close their canal altogether. It is of the utmost importance that the injunction should issue before the hot weather comes. The order for flushing the canal has proved ineffectual. The Judges were unanimous, and did not hear the reply.

It is not the practice of the Court to stay equitable remedies, which are consequent upon legal rights.

[The VICE-CHANCELLOR: I have all along assumed that the effect of the injunction will be to close the canal.]

It is merely a question of increased expense—when they find a poisonous canal will not be permitted, they will have a clean one.

[Reference was made to *Imperial Gas Company* v. *Broadbent* (3); *Tipping* v. *St. Helen's Smelting Company, Limited* (4); *Spokes* v. *Banbury Board of Health* (5).]

SIR W. PAGE WOOD, V.C.:—

With regard to the merits of this case, it appears to me to have been settled by the decision at law, as to the propriety of which I cannot entertain any serious doubt, that the Defendants at law, the lessees of the company, have been guilty of a nuisance in allowing a continued flow of water, in a filthy and polluted con-

(1) 3 N. R. 109; S. C. on appeal, 3 N. R. 399; 12 W. R. 391.
(2) 3 D. M. & G. 304.
(3) 7 H. L. C. 600.
(4) 4 B. & S. 608, 616; affirmed in H. L., 5 July, 1865; S. C. Law Rep. 1 Ch. 66.
(5) Law Rep. 1 Eq. 42.

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dition, into this canal. It is clear, from the evidence, that from this water there is a constant deposit in the canal of foul and fetid mud; and that the increase and accumulation of that which some of the witnesses declared to be a nuisance some twelve or fifteen years ago, from the circumstance of its being, as the Defendants' own witnesses call it, a growing evil, has become a nuisance that is now utterly intolerable. The 12th paragraph of the answer of the company in this case says: [His Honour read the extract above.] The admissions in the special case go even further than that; and the evidence places the fact beyond a doubt that the canal is a nuisance.

Now for this nuisance the company's lessees have been indicted, and the Judges sustained the indictment. It is true the company have full power to draw (I will assume from the *Beck* in question) the water which they may require for all the purposes of their canal; and some works having been erected by them seventy years ago, they are only doing that which for seventy years past they have been continuously doing. But when the Legislature authorized the drawing of water from the *Beck* into the canal it was a pure stream. Fifty years ago it was comparatively pure, but as years have gone on it has become more and more polluted. The information states that thirty years ago it began to become impure; and this impurity has been rapidly progressing, until, about ten years ago, as some of the Defendants' witnesses say, matters were nearly as bad as they are at present. But the last two dry summers have aroused the attention of everybody to the enormity of the evil, and proceedings at law have at length been taken. The lessees of the company are the persons who allow the water to flow into this canal; they have control over the water; it is somewhat pedantic to draw distinctions between non-feazance and mis-feazance; whether one thing or the other, it is a matter which they can put a stop to, and for which they are liable. It is very much as if they had a chimney which had existed for 100 years in their house, and after having burnt fires in the ordinary manner for a great length of time, they had chosen to light something extremely offensive, and had allowed the fumes to pass into the atmosphere. Of course that would have been a nuisance.

But the company and the lessees say they intend to appeal; and

it is contended that I ought not, pending that appeal, to consider the law as established. I was certainly somewhat struck with what might be the consequence of acting upon a decision that was *bonâ fide* about to be appealed from, in case it should be reversed. But I think the sound view of the case is, that this may be a very good argument with reference to the time that should be allowed; but I do not think that I ought to hold my hand simply on account of the decision being under appeal, unless I have some doubt of the justice of the decision.

I had a very strong case before me, *Betts's Case*, where I granted an interlocutory injunction. The decision of the Queen's Bench (1) was against the view which I took; and I then felt such a strong doubt of the propriety of the decision that I ventured to grant an interlocutory injunction, but the decision of the Exchequer Chamber being also against my view (2), I felt myself bound to dissolve the injunction. Then the House of Lords (3) ultimately decided according to the view which I had taken from the first, so that Mr. *Betts* unfortunately lost all the benefit which he might have had from the injunction, in consequence of the intermediate decision of the Exchequer Chamber.

The chief defence in this case has been this: "We are not the persons who create the nuisance; somebody else creates it by fouling the water; the water comes to us foul; we only go on using that which has come to us for seventy years past, and it is fouled through no fault of ours." That is not a sound view of the case. I can quite understand, if this had been a case in which a company had power to cut a channel for the purpose of drawing water from a given river, and then the channel so cut were made navigable, and the company had no further control over it, that it might have been said that the company were not answerable for doing an illegal act. But here the only authority which the Act of Parliament gives them is to draw water; it does not say that they are to draw foul or filthy water, or that they are to draw all these nuisances into the canal. They have the sole control over the flow of the water into the canal; and if, as was put by the Attorney-General in his opening, it were found that the water became so foul with filth and sand as to block up the canal, they would

(1) 1 E. & E. 990. (2) Ibid. 1020. (3) 10 H. L. C. 117.

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not let it into their canal at all. In that state of things a Court of law has said the lessees have created a nuisance, for which they have become indictable; for which they have been indicted and found guilty. The four judges have concurred in that, and I do not find sufficient ground for doubting that decision to say that I ought to hold my hand in granting an injunction.

Then there were other grounds alleged, amongst which was this. It was said that the case having been tried at common law, it is quite enough to leave it in the hands of a Court of common law; there is no reason at all for this Court to interfere; and it is further said, as part of that reasoning, that the Court of common law will regard this fact, that after all this company are innocent parties; they are guilty no doubt in the sense of allowing foul water to flow in, but they are not the parties who create the evil: they cannot, themselves, cleanse or take steps for cleansing the *Beck*, therefore they ought not to be attacked; and when brought up for judgment, that will be considered, and a very slight fine will be inflicted upon them. And by parity of reasoning, it is said that a Court of equity should see that the proper persons to be sued are those who are guilty of bringing the pollution into the *Beck*, and ought not to restrain the Defendants. But I cannot admit that answer. It might be urged, in cases like *Tipping's Case* and others, in which a person is annoyed with a number of nuisances; where if the Plaintiff cannot trace a specific grievance to the person whom he is suing, as in *Wood* v. *Sutcliffe* (1), he cannot be relieved. Lord *Cranworth*, in *Wood* v. *Sutcliffe*, seems to have thought this: "You have not shewn any special grievance; you cannot satisfy me that if I grant the injunction to-day you will be one whit the better off to-morrow; and the evil which this gentleman is doing, as compared with others, is so trifling, that I cannot see my way to grant an injunction." But I think this case falls far short of anything of that kind.

The Defendants say, that if the canal is a nuisance, the *Beck* is a greater nuisance; and that by stopping the canal, a worse nuisance still will be created, because the whole of this filth will then be thrown into the *Beck*. That may or may not be the case;

(1) 2 Sim. (N. S.) 163.

if it is, it may afford a ground for prosecuting those who do the act complained of. I am by no means satisfied that the nuisance in the *Beck* is so great as in the canal, for the course of the *Beck* is certainly more rapid. Mr. *Beardmore* says there are rapids in the stream; though he admits, on the other hand, that there are holes and pools and eddies in the *Beck*, where a nuisance accumulates. It may be said, that the persons who are annoyed by the nuisance in the canal will not be annoyed by the eddies and pools in the stream. I cannot say how that would be, but it is quite enough to say that the persons who are represented by the Attorney-General are annoyed; and as they have made out the annoyance, I cannot stop to inquire whether any other persons may be annoyed by those eddies and pools. Nor do I think it ought to interfere with my decision, if it were shewn that there will be some annoyance felt from the fact of a larger quantity of this offensive matter being sent down the *Beck*. That is an argument which might be presented in every case where there are four or five evils at once assailing those who complain. It would be impossible for the Court to wait till bills were filed in the three or four other cases, and be governed to some extent by the decisions in those other cases.

During the whole of the argument it appeared to me there was only one point that required much consideration, and that was the question of delay. It is said the public have submitted to this evil for about ten years, and during that time they have allowed the company to go on drawing the water. If they had interfered earlier, the company might have limited their capital, they might have seen what difficulties they would have to encounter. Mr. *Amphlett* says that barges and boats have been built, and stock and capital increased upon the faith of no interference taking place. Possibly he might have added that persons have bought shares in the undertaking upon the faith that, having been allowed to go on for ten years doing this, they would never be interfered with. Now I do not doubt that there may be cases, such as Lord *Eldon* put in the case of the *Attorney-General* v. *Johnson* (1), in which laches might be imputed to the public through the medium of the Attorney-General, cases of large expenditure incurred in buildings

(1) 2 Wils. C. C. 87.

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which are seen by the public, and are allowed to go on without the slightest complaint on the part of anyone. Of course such cases as those might afford very good ground for saying, that the public, like other people, should not allow that expenditure to be incurred, and then afterwards come forward and complain of the invasion of rights which they might have asserted earlier.

But the case here is of a totally different description. It has been described in the Defendants' evidence, as a gradual and growing evil. The company are not sought to be restrained from using their canal. The Legislature and the parties both desire that the canal should be kept open, but it is not desired that any nuisance should be created to other persons by dirty water being used for that purpose. My own decision in the *Kingston Case* (1), a short time since, has been pressed upon me. It is said, "a person is complained of if he comes too soon, and if he delays coming, he is said to be guilty of laches." Now that, in cases of this kind, persons are obliged to wait for a considerable time before it can be ascertained that a case has arisen for them to put themselves in motion and come to the Court, is an argument which certainly applies more reasonably to the general public whose interests are to be protected, than to a single individual, who may file a bill in this Court as soon as he is aggrieved. The public wait no doubt for a certain time to see whether the evil will diminish. In this instance they waited to see whether it might not be diminished by a certain state of the weather, when the flush of the stream came in; and then there came these two last hot summers, when the evil became intolerable, and led to the litigation. Now, is it an answer to that to say, that money has been spent upon the faith of the undertaking going on? I cannot conceive that such an answer can be given to a case of that description, or that a defence founded on their faith in being allowed to continue the nuisance can be supported.

The only argument which remains is that which was suggested by the company, that the suit ought not to have been brought against them, but only against their lessees. It appears that the lease will expire in the month of April, and that the lessees having been indicted, the company have indemnified their lessees in the indict-

(1) 11 Jur. (N. S.) 596.

ment, and are about to indemnify them in the appeal. The company take the whole case upon themselves, and in the 18th paragraph of their answer they say: [His Honour read the paragraph above.] That is wholly independent of what has been done by their lessees. They do not threaten to continue the nuisance, but they say that very probably they will continue it. The only point is this; the company may say, if the decision of the Court of Queen's Bench should be affirmed, it having been decided only against the lessees, this Court must wait until another indictment is brought against themselves. It certainly is true that the indictment was preferred against the company, as well as against their lessees, but in my view of the case, it could not possibly have been sustained against the company. The principle of the decision is, that the lessees having the whole thing under their control were answerable for drawing that foul water into the canal. How could the company have been answerable for that, not having done it? The estate is out of the company during the lease; they have no authority, they have parted with it to their lessees, and the lessees are the persons who were properly indicted. But I think if in their answer the company say they insist upon the right, that is a strong reason to induce the Court to say that they shall be liable to the injunction.

I may add that it is a further answer to the argument about a Court of law having power to deal with the whole matter, that the Court of law, having only to deal with the lessees, could not possibly put any terms upon the company.

Then the only question is with regard to the time. I do not agree with the Attorney-General as to the length of time to be given. It appears to me that in a case of this magnitude I should not be justified in giving the time with a view solely to the appeal, but I do feel this, that what is to be done must require a considerable time to do, and that, therefore, a considerable time should be allowed; and there the question of delay has its weight undoubtedly. Those who have been delayed, I think, have not excluded themselves from the remedy. They have been delayed several years in taking the steps which they have now taken, and according to my judgment successfully taken. Still upon the ground of the consideration which the Court always has, in cases

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where a good deal of time must necessarily elapse to enable the parties to comply with an injunction without being put to grievous annoyance and expense, I think that the right course to take is this, to grant a perpetual injunction in the terms of the first paragraph of the prayer of the information, from diverting into the canal or collecting, or keeping, or continuing therein any filth, sewage, or polluted matter or water, so as to be a public nuisance; the order not to take effect until the fourth day of Michaelmas term, with liberty to any of the parties to apply; and the interlocutory order as to flushing the canal within certain specified times to be continued.

With respect to the argument that the necessary result of the order will be seriously to stop the canal, and that it will be necessary for the company to go to Parliament to avoid being indicted on that ground, I confess it does not appear to me to be of any weight.

The costs of the suit must be paid by the Defendants.

Solicitors for the Relators: Messrs. *Field, Roscoe, Field, & Francis*, agents for Messrs. *Taylor, Jeffery, & Little, Bradford.*

Solicitor for the Defendants: Mr. *C. Evans*, agent for Messrs. *Hailstone & Mumford, Bradford.*

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STEELE v. STUART.

Contract—Construction—Bankruptcy—Common Partner—Notice—Appropriation of proceeds to bills.

8 QB 142.

A manufacturer, *A*, proposed to a firm of *B & C*, who were the home agents of *A*'s foreign consignees, that they should make advances to him against the consignments, and that "the proceeds of sales, above the advances," should go to the liquidation of an old claim of *B & C* against *A*.

B & C assented to this arrangement by a letter which, after stating that there were two ways of making advances—one for *A* to draw on *B & C*, and take their acceptances, and negotiate them; the other for *B & C* to advance cash to *A*, and draw on *A* for the amounts, *A* to accept, and *B & C* to negotiate—concluded thus: "and we shall retire that acceptance from proceeds of the sales."

In pursuance of this arrangement, *A* directed his consignees to remit to

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B & C, and *B & C* made advances to *A* by drawing on him, negotiating his acceptances, and remitting the proceeds to him. Afterwards *B & C*, being in want of money, directed the consignees to remit, not to themselves, but to a firm of bankers, *C & D* (having a common partner with themselves), as a security for advances made by *C & D* to *B & C*.

Upon *B & C* becoming bankrupt,

Held, that *C & D* had notice of the arrangement between *A* and *B & C*, through the fact of the common partner; and that, upon the construction of the contract, the remittances in the hands of *C & D* were appropriated in equity, first to the payment of *A*'s acceptances, and subject thereto, to the discharge of the old claim.

THE Plaintiff, *Edward Steele*, was a soap manufacturer of *Liverpool*.

He was in the habit of consigning his goods to the Defendants, *Robert Towns* and *Alexander Stuart*, merchants at *Sydney*, under the firm of "*R. Towns & Co.*," for sale, with instructions to remit the proceeds to the Defendants, *Thomas Mitchell Staig* and *Joseph Gordon Stuart*, the agents of *R. Towns & Co.* at *Kirkcaldy*.

Joseph Gordon Stuart was also in partnership with his brother the Defendant, *James Stuart*, as bankers in *London*, under the firm of "*Stuart Brothers*," and they were the agents and *London* correspondents of *Staig & Stuart*.

The course of business was as follows:—The Plaintiff on shipping goods to *R. Towns & Co.* used to send them the bill of lading and invoice of the goods, with instructions as above stated. The Plaintiff used to advise *Staig & Stuart* of the shipments, and used to give them one or two bills of lading of the set. These were ordinarily forwarded by *Staig & Stuart* to *R. Towns & Co.* The Plaintiff, or *Staig & Stuart*, as the case might be, used then to draw against the shipments. These drafts, when accepted, were discounted by *Staig & Stuart*, and the proceeds were remitted by them to the Plaintiff by way of advance against the shipments.

The bill (paragraph 6) alleged as follows:—"Messrs. *R. Towns & Co.* were instructed by the Plaintiff to remit the proceeds of the goods sold by them to Messrs. *Staig & Stuart*, in order that such proceeds might be applied in taking up the bills discounted by Messrs. *Staig & Stuart* as aforesaid, and in payment of the said advances. It was agreed between the Plaintiff and

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Messrs. *Staig & Stuart*, with the privity of Messrs. *R. Towns & Co.*, that the proceeds of the said sales should be applied in meeting the said discounted bills, and in payment of such advances as aforesaid, and should in the meantime stand as security for the due payment thereof, and should be appropriated for that, and no other purpose, and that the surplus of such proceeds, after satisfying the said bills or drafts should be handed over by Messrs. *Staig & Stuart* to the Plaintiff."

In June, August, and October, 1860, the Plaintiff shipped four several parcels of soap to *R. Towns & Co.*, each accompanied by a bill of lading and invoice. At the same time he sent bills of lading of the same parcels to *Staig & Stuart*, who drew on the Plaintiff by way of advance against the shipments three bills, which were accepted by the Plaintiff, and discounted by *Staig & Stuart* with the *Union Bank* at *Kirkcaldy*, and the proceeds remitted to the Plaintiff.

On the 20th of February, 1861, and whilst the three above mentioned bills were running, *Staig & Stuart* stopped payment; and a sequestration was issued against them, but they afterwards compounded with their creditors, and their estates were now revested in them under an order of the 6th of April, 1863.

The Plaintiff then discovered that *Staig & Stuart*, being in want of money, had applied to *Stuart Brothers* for advances, and for the purpose of securing such advances, had directed *R. Towns & Co.* to remit the proceeds of the sales of soap to *Stuart Brothers*, which had been done.

Immediately on the failure of *Staig & Stuart*, the Plaintiff and the manager of the *Kirkcaldy* Bank wrote to *Stuart Brothers*, claiming the remittances from *Towns & Co.* as applicable to meet the Plaintiff's acceptances: upon which *Stuart Brothers* replied that they had never known any other parties to the consignments to *Australia* but *Staig & Stuart*; that they believed there would be a surplus due to *Staig & Stuart* after repayment of the amounts they had advanced; but until they saw the state of the affairs of *Staig & Stuart*, and heard further from them, they were unable to say to whom such surplus might belong.

The bill, filed originally on the 8th of December, 1862, prayed

for a declaration that the proceeds of the sales of the parcels of soap were effectually appropriated in equity to meet the bills; that *James* and *Joseph Gordon Stuart* were respectively, or at all events that *James Stuart* was liable to make good to the Plaintiff all moneys received by him or his late firm of *Stuart Brothers* in respect or on account of the proceeds of the sales, with interest. It also prayed an account against *R. Towns & Co.* and *Stuart Brothers;* and that the Defendants might be decreed to make good the amount found due, and that such amount might be secured and applied, under the direction of the Court, in the first place in satisfying the bills, and the surplus paid to the Plaintiff; and for a receiver.

James Stuart, by his answer, said that the remittances from *R. Towns & Co.* were placed to the credit of *Staig & Stuart* as against the advances made to them in a special account opened and kept by *Stuart Brothers* in their books for that purpose, called "The *Australian* Account." The Defendant said that none of the statements made by *Staig & Stuart* of the sums which they had directed *R. Towns & Co.* to remit to *Stuart Brothers* contained any intimation of the person or persons by whom the shipments therein mentioned were made, and he denied (paragraph 63) that, prior to the suspension of *Staig & Stuart,* he knew or had notice when the remittances arrived, either that the goods had not been actually sold, or that they belonged to the Plaintiff, and not to *Staig & Stuart,* or that *Staig & Stuart* were concerned as agents only.

He insisted that the Plaintiff had no lien or charge on the remittances; that if he ever had any, it had been extinguished by the dealings between him and *Staig & Stuart;* that by the conduct of both parties, *Staig & Stuart* had been enabled to hold themselves out as sole owners of the proceeds of the shipments; and that the Plaintiff was not now entitled to question the disposition of the proceeds.

The Defendants, *R. Towns* and *A. Stuart,* by their answers, admitted a balance due from them of £98 odd, but subject to a set-off of an old balance; and said that they had been sued at law in respect of the same matters.

The Defendants *Staig & Stuart* were out of the jurisdiction. An

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order for service of the bill on them was discharged by the Court in December, 1863 (1).

A demurrer by *James Stuart* to the bill was overruled on the 9th of March, 1864 (2).

From an affidavit filed by the Plaintiff on the 25th of May, 1865, it appeared that in 1860 there was an old debt due from him to *Staig & Stuart* in respect of advances, and that on the 19th of June, 1860, he wrote to *Staig & Stuart* a letter, of which the following is the material portion:—

"We beg to ask you whether you have yet had account sales of the small lot of soap consigned by us to Messrs. *R. Towns & Co.* per *Telegraph* about twelve months ago. We applied to you on this point in May last, but you could not then say, your book-keeper being at the time absent. Our letter was dated 22nd of May, to which we beg to refer you, also in respect to an inquiry regarding a concession promised us by *Towns & Co.*, when here two years ago. We have some intention of resuming shipments to *Sydney*, seeing that our manufacture meets a ready sale at good prices at *Melbourne*, *Adelaide*, *Launceston*, &c., and that we have occasionally considerable orders for *Sydney* from *London* houses, for which good prices are paid us. We have understood that *Towns & Co.* are more agents for shipping than for the sale of goods; but we presume they would manage our business as well as any other house at *Sydney*, notwithstanding our proposition would be to ship to them from time to time crown and second brown soap, the advance required on which would be £22 and £16 per ton as paid us by Messrs. *Dalgety & Co.*, Mr. *Elder*, and others, and that the proceeds above the advances should, till acquitted, go to the liquidation of the old claim."

On the 20th of June, *Staig & Stuart* replied in the following terms:—"The cheapest way of making the advance is for you to take our three or four months' acceptance for it, which we shall pay, advancing the money for you at ordinary interest and 1 per cent. commission; or, if you prefer it, we shall give you cash on receiving bills of lading, and take your six months' acceptance for the same, with interest at 5 per cent., and 1 per cent. commis-

(1) 1 H. & M. 793. (2) 3 N. R. 686.

sion; and we shall retire that acceptance from proceeds of the sales."

The Plaintiff relied upon these letters in support of the allegation in the 6th paragraph of the bill.

Mr. *W. M. James*, Q.C., and Mr. *Druce*, for the Plaintiff:—

The simple question is whether a firm consisting of *A* and *B* can retain moneys which have been appropriated to a particular purpose by a firm consisting of *B* and *C*.

The contract between the Plaintiff and *Staig & Stuart* is proved by the letters; and the knowledge of *Stuart Brothers* follows from the fact of the common partner.

They cited *Jacaud* v. *French* (1); *Porthouse* v. *Parker* (2); *Powles* v. *Page* (3).

Mr. *Rolt*, Q.C., and Mr. *Freeling*, for *James Stuart*:—

Staig & Stuart, by virtue of the bills of lading, had a lien upon the remittances from *Australia* for the amounts advanced by them to the Plaintiff. What was there to prevent them from making use of this lien by obtaining advances on the security of it from *Stuart Brothers?* At least, to the extent of their old debt, there can be no doubt of their power of disposing of the security.

The question is, who is to lose, the Plaintiff, or the persons to whom he has pledged this property? *Jombart* v. *Woollett* (4).

Staig & Stuart became possessed of this property by making an advance or accepting a bill. From that moment the Plaintiff could not have come here and restrained them from receiving the money.

Then *Staig & Stuart*, the pledgees, raised money upon their pledge, and paid *Stuart Brothers*. Supposing the money to have come into the coffers of *Staig & Stuart* on the 12th of January, *Staig & Stuart* failing on the 20th of February, could the Plaintiff have come to the assignees and claimed the money? Then upon what principle can he claim it in the hands of *James Stuart?*

(1) 12 East, 317.
(2) 1 Camp. 82.
(3) 3 C. B. 16, 30.
(4) 2 My. & Cr. 389.

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Mr. *Bagshawe*, for *R. Towns & Co.*, asked for the costs of the action at law.

SIR W. PAGE WOOD, V.C.:—

A great deal of ingenuity has been exercised in the argument about this contract; but in itself it is very simple. The contract is correctly averred in the bill, with one exception, that that portion of the agreement is not mentioned which, now that the whole of the evidence is before us, appears to be clear, namely, that, after the appropriation of the returns made from *Australia* to the particular advances which should be made in respect of the shipments, any balance that might remain was to be applied towards liquidation of an old debt which was due from the Plaintiff to Messrs. *Staig & Stuart*. That portion of the agreement appears from the letters of the 19th and 20th of June.

The bill states the agreement thus: [His Honour read the 6th paragraph set out above.]

Now, what is the agreement as we find it in these two letters? In the letter of the 19th of June, the Plaintiff says, writing for his firm to *Staig & Stuart*: "We beg to ask you," &c. [His Honour read the letter.]

Now there are two propositions there. The agreement is, that "the proceeds above the advances should, till acquitted, go to the liquidation of the old claim." But that involves the proposition that the proceeds are first to be applied to the advances until they are satisfied. If I say that the proceeds of the sale above advances shall be applied to a given purpose, of course it is a necessary implication that they shall be applied first to the advances, and after that to the specified purpose.

I read the answer to that letter, not in the sense in which it has been read by Mr. *Rolt*, as forming an alternative proposition as to whether or not the proceeds shall be applied to advances, but merely as an alternative proposition as to the mode in which the advances shall be made. They say, "The cheapest way of making the advance," &c. [His Honour read the letter of the 20th of June.]

It has been argued that, if the prior alternative be taken,

namely, that "you shall draw on us, taking a three or four months' acceptance from us, which we shall pay," in that case the agreement has nothing to do with the proceeds. I think Messrs. *Staig & Stuart* would have been astonished if they had been told that anybody had read the letter in that way. The Plaintiff says, "I undertake to pledge all proceeds to make good all advances; and, more than that, to pay you the surplus towards the liquidation of your old debt." The answer is, "We adopt that." It seems to me that is the plain answer. "But there are two ways of carrying it into effect. The one way of making advances is for you to draw on us, for us to accept, and you to negociate; the other way is, that we should draw on you, and you should accept;" and they say, "If you take that course, we shall pay the acceptance out of the proceeds;" and they further say, "We shall have a claim on you if you draw on us, and we shall apply the proceeds to liquidate the advances we make to you." It would have been the same if it had been cash or anything else. If, as Mr. *Rolt* put it, Messrs. *Staig & Stuart* had advanced cash *simpliciter*, and had been content with the proceeds, taking no further liability whatever, then the transaction would have been a mortgage of a different description. But still the proceeds of the sales of the goods are to be applied in one way or the other —either in discharge of the mortgage, or in liquidation of the old debt; and it is impossible to construe these two letters in any other way.

The question of title depends on the second branch of the case about notice. Nobody disputes that, there having been remittances made by the firm in *Australia* to the firm of *Staig & Stuart*, if *Staig & Stuart* had been disposed to deal in a way not honest, and not consistent with the duty which they had undertaken of applying these remittances in repayment of their advances, they might have made a good title to a purchaser without notice. If the statement in the 63rd paragraph of *James Stuart's* answer were true which avers that there was no notice to *Stuart Brothers*, the remedy against them would have been gone. On the other hand, if the 6th paragraph of the bill be proved, which is the paragraph averring notice, then the whole question is at an end; and I conceive that the 6th paragraph is now distinctly proved.

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It is proved that *Stuart Brothers* had notice, because one member of their firm and of the firm of *Staig & Stuart* is the same individual; and the notice cannot be separated. Indeed, this has not been attempted: it is admitted on all hands that, by these two letters, *Stuart Brothers* were bound; it is admitted that *Staig & Stuart* were bound; and the whole argument has been on what is to be the effect of those two letters. I cannot conceive a case more simple than that in which a man places goods in the hands of a mere agent, and says: "Sell these goods for the best amount you can, because I want to raise money upon them, and remit me the proceeds." If the agent fails, everybody who buys from the agent has a perfectly good title, of course. Although you know he is agent, you have a right to regard him as an agent with full authority. On the other hand, if you know he is mortgagee, and has only a qualified interest, and is under an obligation to apply the proceeds in a given way, you may take the pledge from him; but you take the pledge on the terms of applying it as he was bound to apply it; and if there is any surplus, you will get it. Had there been a surplus of these proceeds after paying the advances, and had there been an old debt of *Staig & Stuart* existing, they would have had the benefit of claiming to that extent out of the surplus, after the taking up of these bills.

The engagement appears to me to be one of the most simple that can be conceived. The Plaintiff says, "The proceeds are pledged for your advances; you take them for a specific purpose, and for that purpose you have a right to apply them. You can transfer that pledge to anybody you like; honestly, if you tell them the nature of the pledge; dishonestly, if you do not inform them of the obligation which is imposed. But if you make a transfer to a person who, in this Court, must be taken to have full knowledge of your position, he must take up the bills, just as you would have had to take them up."

As regards *Towns & Co.*, it seems to me, on the whole, that they have been unnecessarily brought here. But I think their answer is unfortunate. They say they were being pressed in an action at law. The bill was filed; they knew that the Plaintiff had elected, as he was bound to do under the order of

the Court, to proceed in equity. I take it I cannot deal with those costs at law; they should have applied at law, where, probably, they would have got them. As to their costs here, I think, in all probability, they would never have been brought here, except for the other contest. At the same time, an account is asked against them, as it was asked against them at law; and upon that they say, "We have got £98, but it is subject to the old balance, and we want to have an account and set-off." Now they say, "We do not want that account." Under these circumstances I cannot give them any costs, but I do not make them pay any.

In making the following declaration, I ought to notice that it is said that these returns are not acquired as actual proceeds, but as returns made anterior to the sale. I apprehend that makes no difference whatever. If *Towns & Co.* chose to deal with them as proceeds which, by the custom of the trade, they say, they were entitled to do—if they thought fit to hand them to *Stuart & Co.* as proceeds, and *Stuart & Co.* received them as such, they must be so dealt with.

MINUTES:—Declare that the returns made by *R. Towns & Co.*, in respect of the Plaintiff's shipments in the bill mentioned, were appropriated by the letters of the 19th and 20th of June, 1860, to the payment of all advances made to the Plaintiff by Messrs. *Staig & Stuart*, and to the taking up of all bills drawn or accepted by the Plaintiff in respect of such advances; and subject thereto to make good the balance, if any, now due to *Staig & Stuart* in respect of the dealings between them and the Plaintiff, prior to the 19th of June, 1860.

Declare that the Defendants, *James Stuart & Joseph Gordon Stuart*, received such returns as aforesaid made to *Stuart Brothers* by *R. Towns & Co.*, with notice of such appropriation, and that *James Stuart & Joseph Gordon Stuart*, as constituting the firm of *Stuart Brothers*, became liable to make good to the Plaintiff the amount of all moneys received by them in respect of such returns, after satisfying any advances made by *Staig & Stuart* to the Plaintiff, and any balance now due to *Staig & Stuart* in respect of any dealings between them and the Plaintiff prior to the 19th of June, 1860.

Direct, 1, an account of the moneys received by *Stuart Brothers* in respect of such returns, with interest at 4 per cent. from the time of receipt to the time of payment; 2, an account of what, if anything, remains due to *Staig & Stuart*, in respect of any advances made by them on account of the Plaintiff's shipments, or in respect of any debt due to them from the Plaintiff before the 19th of June, 1860; 3, an account of the sums which have been received by the *Union Bank of Kirkcaldy* from the estate of *Staig & Stuart*, in respect of the bills of exchange accepted by the Plaintiff as in the bill mentioned.

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Set off the result of the accounts 2 and 3 against the result of account 1; certify the balance, and let the balance be paid within one month from the delivery of the certificate.

Let the Defendants, *R. Towns & A. Stuart*, pay to the Plaintiff the £98 3*s.* 6*d.* (admitted by the answer to be due), with interest thereon from the foot of and at the rate charged by them in the account sales, the amount to be verified by affidavit; or, at the request of *R. Towns & A. Stuart* take an account of all dealings between them and the Plaintiff, and ascertain what balance is due either way, within one month from the delivery.

The Plaintiff's costs of the suit to be paid by *James Stuart:* no costs either to or from *R. Towns & A. Stuart.*

Liberty to apply.

Solicitors for the Plaintiff: Messrs. *Marshall, Westall, & Roberts,* agents for Messrs. *Forshaw, Goodman, & Hawkins, Liverpool.*

Solicitor for *Stuart Brothers:* Mr. *J. T. Simpson.*

Solicitors for *R. Towns & Co.:* Messrs. *Wilde, Rees, Humphry, & Wilde.*

In re ANN PARRY.
Ex parte DUKE OF BEAUFORT.

V.-C. S.
1866
March 9.

Practice—Leave to traverse Inquisition—Escheat—Jurisdiction.

On the petition of a grantee from the Crown of a manor with escheats, the Court granted leave to the Petitioner to traverse an inquisition finding that certain lands within the manor had devolved on the Crown by virtue of the prerogative Royal. The Court has jurisdiction where there is sufficient evidence, not merely to give leave to traverse, but wholly to quash the inquisition.

BY a grant of *Charles* I. the Manor of *Monmouth* was granted to *Charles Harbord Christopher Favell* and *Thomas Young*, together with all *escheats*.

By devolution of title the Petitioner, the *Duke of Beaufort*, had become Lord of the Manor of *Monmouth*, and entitled to all the rights and advantages thereto belonging, granted to the said *Harbord Favell* and *Young*, &c., including (as the Petitioner alleged) all escheats.

One *Ann Parry*, being seized in fee simple of a tenement called the *Red Lion*, situate within the Manor of *Monmouth*, and of the value of £20 a-year, subject to a mortgage, died in March, 1851, intestate and without an heir.

A commission subsequently issued in the 29th year of the Queen, under which the jurors on their oath found that *Ann Parry* was in her lifetime seised of the messuage called the *Red Lion*, subject to a mortgage . . . . that she died in March, 1851, without having devised the said messuage, and without leaving any heir of her body or any right heir her surviving; that the said messuage was of the annual value of £20; that it was in the occupation of *Ann Parry's* husband, and was holden of Her Majesty in free and common socage, but not subject to rent or service, except fealty, and by reason of the premises had devolved on Her Majesty as an escheat, by virtue of her prerogative Royal.

This Petition by the Duke of *Beaufort*, as Lord of the Manor, alleged that the Petitioner was wholly ignorant of the inqui-

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sition being held, and that independently of the grant of the escheats, the Petitioner was entitled as Lord of the Manor. The Petitioner asked for leave to traverse the inquisition and return, or demur to the same.

Mr. *Malins*, Q.C., and Mr. *Cracknall*, appeared for the Petitioner, and asked for leave to traverse the inquisition.

The VICE-CHANCELLOR:—The evidence sufficient to entitle the Petitioner to traverse the inquisition would entitle him to have it quashed.

Mr. *Wickens*, on the part of the Crown, admitted the jurisdiction of the Court to give leave to traverse the inquisition, but submitted that the Court had no jurisdiction to quash it.

Mr. *Malins*, referred to a decision of Vice-Chancellor *Turner*, in the matter of *Kane* (1), where leave had been given to traverse. The case was unfortunately not reported, but there was a copy of the order in Court.

(1) The order in *Re Kane* was as follows:—

In the Petty Bag.

In Chancery.

July 30, 1852.

Re KANE.

Order to be at liberty to traverse Inquisition.

VICE-CHANCELLOR TURNER:—

Friday, July 30, 1852.

WHEREAS *Mary Cane* (*), spinster, did, on the 22nd July, 1852, prefer her Petition unto the Lord Chancellor, setting forth as therein set forth, and praying that the Petitioner might be admitted by his Lordship at full liberty to traverse the inquisition and return in the Petition mentioned, or to demur to the same, or either of them, as she might be thereto advised, in such manner as his Lordship should be pleased to order and direct, and that the said inquisition might be quashed and set aside, whereupon all parties concerned were ordered to attend his Lordship on the matter of the said Petition, and counsel for the Petitioner, and for Her Majesty's Attorney-General, and for *James Child*, and *Charlotte A. Walton* and her trustees, this day attending. Accordingly, upon hearing the said Petition, a commission of escheat in the matter of the said *Kane*, and the inquisition taken thereupon, bearing date the 19th day of May, 1848; an order

(*) *Sic* in orig.

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On a subsequent day the VICE-CHANCELLOR mentioned the case, and said he had no doubt that the Court had jurisdiction not merely to give leave to traverse, but wholly to quash the finding. His Honour also noticed that the proceeding on this Petition was not under the equitable jurisdiction of the Court, but under its common law jurisdiction, and from the Petty Bag.

The Counsel for the Petitioner, however, stated that, with reference to other questions of the same kind arising on the Petitioner's grant from the Crown, it was considered advisable to take the order merely to traverse. The order was therefore made merely for liberty to traverse.

Solicitors for the Petitioner: Messrs. *Watkins, Baker, & Baylis.*
Solicitors for the Crown: *Solicitors to the Treasury.*

LAWTON *v.* FORD.

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1866
Feb. 28;
March 1, 6, 7, 8, 23.

Term of Years—Mortgage—Statute of Limitations (3 & 4 *Wm.* 4, *c.* 27) *ss.* 25, 40 *—Express Trust—Acknowledgment—Interest.*

A sum of money settled upon certain members of a family was invested on mortgage of a trust term of the family estates. In 1829, on a re-settlement of the estates, the subsistence of the term and the charge was acknowledged. No interest having been paid in the meantime, a family arrangement was executed in 1851, by which the tenant for life under the re-settlement of 1829, acknowledged the subsistence of the term and the charge, and afterwards paid interest thereon. The tenant in tail was not a party, being an infant:—

Held, as against the tenant in tail, that the term and the charge were subsisting, and that the *Statute of Limitations* did not apply.

A BILL for the purpose of having the rights of the persons interested in two sums of £4000 each, ascertained; and for consequential relief.

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dated the 11th December, 1833; the Master's Report, dated the 23rd of May, 1834; an order dated the 10th of February, 1834; letters of administration, with the will annexed, of the goods, chattels, and credits of *Charles Kane*, granted to *Thomas Kane*; an affidavit of *Charles James Partington*, and several other affidavits, the Court doth order that the Petitioner, *Mary Kane*, be at liberty to traverse the inquisition taken on the said inquisition of escheat in the matter of said *Thomas Kane*, in the said Petition mentioned.

A. 1851, fo. 1289, E. D. C.

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Sarah Crewe, in February, 1772, conveyed estates to trustees upon trust after her death to sell; to apply one moiety of the proceeds as directed, and to apply the residue of the other moiety (after paying *John Lawton* and *Ann* his wife £1000), as she should by deed or will appoint; and in default of appointment, to pay such residue to her executors for them to administer as personal estate.

Sarah Crewe, by another deed, in September, 1774, directed the same trustees to pay £4000, part of the proceeds of the latter moiety to other trustees upon trust *inter alia* to pay the income to *Ann Lawton*, for life, and after her death, to pay the £4000 to her eldest son *William Lawton*.

On her marriage, *Sarah Crewe* (afterwards *Swinnerton*), by deed in November, 1778, after reciting the former deeds, and that the proceeds of a moiety of the estate would, after the deduction of the £4000, belong to her, conveyed and assigned to trustees her estates and the moneys that she would be entitled to from the proceeds of sale upon trust if she should survive her husband (which event happened), for her own use absolutely. And by her will in January, 1791, she gave the said moiety of her estates upon trust to pay the rents to *Ann Lawton*, for life, and after her death, to *Charles Bourne Lawton* (her second son), for life, with remainder to his first and other sons in tail, with remainder to *John Lawton* (the third son), for life, and his first and other sons in tail, with a shifting clause, in case *Charles Bourne Lawton* should, by the death of his elder brother *William*, become entitled to the *Lawton* Estates.

Mrs. *Swinnerton* died in 1796, and the trustees of the deed of 1772 sold the estates, and out of the second moiety of the proceeds paid to *Thomas Parker*, as trustee of the deed of 1774, a sum of £4000, and he invested the same upon a mortgage dated the 21st of September, 1801, of a term of 1000 years in the *Lawton* Estates, created by a marriage settlement of February, 1727, and thereby vested in trustees for raising portions.

Out of the same proceeds, another sum of £4000 was paid to *Hugh Henshall*, the executor and trustee of Mrs. *Swinnerton's* will, and he invested the same upon a mortgage dated the 21st of September, 1801, of a term of 500 years in the *Lawton* Estates,

created by another marriage settlement of December, 1774, and vested in trustees for raising portions.

John Lawton (the husband of *Ann*) died in March, 1804, and thereupon, under the deed of December, 1774, *William Lawton* became tenant for life of the *Lawton* Estates, with remainder to *Charles Bourne Lawton*, as tenant in tail, with remainder to *John Lawton* as tenant in tail; and upon *Ann Lawton's* death in November, 1810, *William* became absolutely entitled to *Parker's* £4000.

During the life of *Ann Lawton*, the interest on both sums was duly paid to her. By an indenture, dated the 17th of March, 1829 (being a re-settlement of the estates), to which *William*, *Charles Bourne*, and *John Lawton*, and numerous other persons were parties; after reciting the deed of December, 1774, it was recited that the sums of £4000, and £4000 and interest, were still subsisting charges on the *Lawton* Estates, and that they remained due upon the security of the terms of years. By the deed of 1829, *Charles Bourne Lawton* and *John Lawton* became tenants for life in succession in remainder after the life estate of *William*, but with the benefit of immediate annuities.

William Lawton died in March, 1831, having by his will given his property to *Charles Bourne Lawton*, who in August, 1831, proved the will, and under it he became entitled to *Parker's* £4000.

Charles Bourne Lawton, who died in February, 1860, and *John Lawton*, who died in August, 1831, were the next of kin of *William Lawton*.

In 1850, *Charles Bourne Lawton*, having forgotten that he had proved the will, it was supposed and assumed that *William Lawton* had died intestate, and doubts arose respecting the character in which the sums of £4000 and £4000 were to be considered, whether as real or personal estate, and as to the rights of the *Lawton* family therein; and on an application being made to *C. B. Lawton* (then eighty years of age), by some of the persons interested, a memorandum of agreement, dated the 16th of January, 1851, was prepared by the solicitors of *C. B. Lawton*.

At that time it was supposed that *C. B. Lawton* and *John Lawton*, as next of kin of *William*, were entitled to £2000 each of

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Parker's £4000; and that *Henshall's* £4000 had devolved on *John* for life, with remainder to his eldest son absolutely, *C. B. Lawton* having, on the death of *William*, become entitled in possession to the estates, but, under the deed of 1829, for life only. *John Lawton*, had died in August, 1831, intestate, leaving a widow and six children (the eldest of whom died in May, 1833, intestate and a bachelor) surviving.

By the agreement of January, 1851, after reciting *inter alia* the investments of the two sums of £4000, and the rights (as then supposed) of the parties therein; that *C. B. Lawton* was tenant for life of the estates; that he had not paid interest upon the mortgages to *Parker* and *Henshall* for many years; and that he would acknowledge the mortgages were subsisting; it was agreed that *C. B. Lawton* should assign his interest in *Parker's* £4000 to others of the parties for their absolute use; that he should renounce his right to take out administration to his brother *William;* that he thereby acknowledged that the mortgages were valid and subsisting; and that the two sums of £4000 were chargeable upon the estates; that interest should be waived up to the 31st of December, 1850, *C. B. Lawton* agreeing to pay interest from the 1st of January, 1851. This agreement was executed by all parties interested except the tenant in tail, who was an infant.

Letters of administration to the personal estate of *William Lawton* were, in February, 1851, granted to *Elizabeth*, the widow of *John*.

The terms of 1000 years and 500 years were in March and April, 1851, assigned by the representatives of *Parker* and *Henshall* respectively to the Defendants *Ford* and *Sharman* (since deceased), subject to the equities subsisting. In March and August, 1851, deeds confirming the agreement of January, 1851, were executed by the parties to that agreement, but shortly afterwards it was discovered that *William Lawton* had made a will, and that fact, and that he had proved it, were made known to *C. B. Lawton;* and thereupon questions arose whether the agreement of January, 1851, and the subsequent deeds of March and August, were binding on the parties thereto; and *C. B. Lawton* insisted that he was not bound by them, and that he was entitled to the whole of *Parker's* £4000.

From June, 1852, to March, 1854, there were negotiations

with a view to a settlement of all the questions, and another memorandum of agreement was prepared, whereby it was proposed that *C. B. Lawton* should receive £1000 in respect of *Parker's* £4000; but further differences arose, and the agreement was not executed. For one year, from the 1st January to the 31st December, 1851, *C. B. Lawton* had paid interest at the rate of £5 per cent. to the *Lawton* family upon their estimated shares in both sums, but after the above-mentioned discovery he made a deduction from such interest.

C. B. Lawton died in February, 1860, and thereupon his brother *John's* son, *John Lawton* the younger, entered into possession of the estates as tenant for life, under the deed of the 17th of March, 1829.

John Lawton the younger died in 1862, leaving his son, the Defendant, *William John Percy Lawton* an infant and tenant in tail, and he alleged that these sums were not now owing; and that if they had not been paid off the right to have the same now raised was barred by the *Statute of Limitations.*

Mr. *Kenyon,* Q.C., and Mr. *J. W. Chitty,* for the Plaintiff, stated the facts, and submitted that the agreement of January, 1851, and the deeds confirming it ought to be supported.

Mr. *Lewin* for the surviving representative of *C. B. Lawton,* offered to abide by the agreement upon payment to him of £1000; and that offer having been agreed to by those interested in the term of 1000 years,

The VICE CHANCELLOR said the parties to the agreement of January and to the deeds of March and August, 1851, offering to allow the representative of *C. B. Lawton* the sum of £1000 out of the £4000 invested in *Parker's* name, and that sum having been accepted, there must be a declaration that the agreement and the subsequent deeds were binding upon all the parties thereto, and ought to be carried into effect.

Mr. *Kenyon,* Q.C., and Mr. *J. W. Chitty* then contended that the character of real estate was not impressed upon these sums by the will of Mrs. *Swinnerton,* but assuming that it was, *John Lawton*

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had a clear right to determine it, and he did do so, by executing the disentailing deed of March, 1829, which gave effect to the terms which were recited in it, and reserved the sums as a debt upon the estates. That deed of 1829 bound *John* in such a manner, upon a family arrangement, as to make it impossible for those representing the infant tenant in tail to successfully contend that the terms were not subsisting.

Mr. *Herbert Smith,* for the legal personal representative of *John* and *William Lawton,* submitted that the deeds of compromise of 1851 had prevented the operation of the 40th section of 3 & 4 Wm. 4, c. 27. Those deeds were an acknowledgment of the debts, and, therefore, it was not competent to the tenant in tail now to set up the statute as a bar to the claims.

Mr. *Malins,* Q.C., and Mr. *T. C. Renshaw,* for other Defendants, in the same interest:—

The tenants in tail in remainder, who became under the deed of 1829 tenants for life in succession, recognised these charges as valid, and it is beyond all doubt that they had not ceased in 1851, for interest was paid by *C. B. Lawton.* If these terms are express trusts, the 25th sec. of 3 & 4 Wm. 4, c. 27, gets rid of all difficulty as to lapse of time; but assuming that they were vested in mortgagees, then the owners of the inheritance in 1829 dealt with the estates subject to these charges, and the infant tenant in tail has not a better right to the inheritance than the other Defendants have to these charges. [Mr. *Bacon,* Q.C.:— The period to be accounted for is between March, 1829, and January, 1851.] The payment of interest to the persons entitled to these charges is conclusive that they are subsisting. The payment of interest by a tenant for life is sufficient to keep alive charges against those in remainder: *Roddam* v. *Morley* (1).

The infant tenant in tail takes under the deed of 1829, which gave validity to these charges, and, therefore, he can only take subject to them. [The VICE-CHANCELLOR mentioned *Morley* v. *Morley* (2); and *Chinnery* v. *Evans* (3).] The language of the

(1) 2 K. & J. 336; and on app. 1 De G. & J. 1.

(2) 5 D. M. & G. 610.

(3) 11 H. L. C. 115.

statute is quite sufficient to prevent any bar, for there has been an acknowledgment by the tenant for life, and it is quite immaterial whether payment of interest be proved or not to have been made in 1851.

Mr. *W. M. James*, Q.C., and Mr. *Cracknall*; Mr. *Craig*, Q.C., Mr. *Greene*, Q.C., and Mr. *Osborne Morgan*, for other Defendants in the same interest, submitted that the deed of 1829 must be taken as the starting point for the derivation of the rights of all parties, and that the infant tenant in tail was estopped from questioning the validity of the terms of years, or the amounts thereby secured.

Mr. *W. Barber*, for Mortgagees.

Mr. *Dickinson*, for Trustees.

Mr. *Bacon*, Q.C., and Mr. *Watson*, for the infant tenant in tail:—

The Statute is a complete bar. *Parker* and *Henshall*, when the terms were transferred to them, held upon no express trusts whatever. They held the terms as mortgagees, but with no express trusts, and therefore the *Statute of Limitations* is relied upon. The persons to whom they paid their money were trustees of it for the persons entitled to portions under settlements. By those settlements the terms were created, and in them there were express trusts; but when the trustees in discharge of their duty, raised the portions and paid them, there was an end of the trusts. The terms remained, but not as trust terms—they were terms in mortgagees, in which capacity both *Parker* and *Henshall* acquired them, and, therefore, the saving in the statute, as to express trusts, does not apply. [The VICE-CHANCELLOR mentioned *Cox* v. *Dolman* (1), and *Codrington* v. *Foley* (2).] This case is not like *Cox* v. *Dolman*, for that was a case of express trust. But, between March, 1829, and January, 1851, no interest was paid, and that is a complete answer to these claims, unless the statute be wholly disregarded. It is probable that *William* and *C. B. Lawton* were desirous that these sums should

(1) 2 D. M. & G. 592. (2) 6 Ves. 364.

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sink into the inheritance. The infant tenant in tail is in possession, and cannot be ousted but by operation of law. It was not competent to a tenant for life to revive the charges in 1851, and his conduct could not affect the tenant in tail's rights in reference to those charges which had become conclusively extinguished in 1849 by the operation of the statute: *Gregson* v. *Hindley* (1); *Lord St. Leonard's* Treatise on Statutes (2). [The VICE-CHANCELLOR mentioned *Hunter* v. *Nockolds* (3).] The acknowledgment relied upon is that of *C. B. Lawton;* but the twenty years having elapsed, and no interest having been paid, that acknowledgment cannot affect the operation of the statute. The case of *Roddam* v. *Morley* has nothing to do with this case. The equity of redemption was in the trustees who had mortgaged the terms, and they held that equity till 1849 in trust for the infant tenant in tail. At that time the mortgages ceased, and the terms were satisfied; or if they subsist at all, they are in trust for the protection of the estates, and attendant upon the inheritance. In *Bolding* v. *Lane* (4), the effect of an acknowledgment in writing was confined to the interest of the individual giving it. The trustees of the *Lawton* Estates are not before the Court. The compromise of 1851, by the tenant for life, can have no effect as against the tenant in tail, and against the inheritance; but if it be so held, it will be sanctioning a fraud committed by a tenant for life.

SIR J. STUART, V.C.:—

The argument on behalf of the tenant in tail has proceeded upon the supposition that this is not a case of subsisting and unsatisfied terms; but the recitals in the deed of 1829 are conclusive upon the subject. That was a deed by which a resettlement of the estates was made by the tenant for life, and those who were owners of the inheritance; and it recites the terms as subsisting, and as securities for the two sums of £4000 and interest. If that be not enough there is the agreement of compromise of January, 1851, by which the settlor of 1829, who had cut down his estate of inheritance to an estate of life, but who still was the

(1) 10 Jur. 383.
(2) 2nd ed. p. 28.
(3) 1 Mac. & G. 640.
(4) 1 D. J. & S. 122—134.

owner of the freehold in the estates subject to the terms again recognised the existence of those terms, and he afterwards executed deeds of family arrangement, the necessity for them depending upon the existence of the terms, and upon the right to receive the two sums of £4000 secured by them, as subsisting charges upon the estates. The case of *Coe* v. *Dolman* was decided upon a principle which subsists in other cases; but it is perfectly plain, that if you have a subsisting and unsatisfied term limited by a deed of family arrangement, the trusts of that term are not affected by the *Statute of Limitations*. The term having been created for the purposes for which terms are created by family settlements, the statute cannot reach it. No doubt, there are great anomalies in the now well-settled law as to the limitation of terms in family settlements. Lord *Eldon*, in the case of *Codrington* v. *Foley* (1), clearly expounded the law, as Lord *Macclesfield*, Lord *Hardwicke*, and Lord *Thurlow* had done before. It is needless to refer to the cases in detail, as the excellent treatise of Sir *Charles Chambers*, on "Leases and Terms of Years," in which he was assisted by Mr. *Sanders*, one of the greatest conveyancers of the day, contains a clear exposition of the law, and an accurate summary of the cases. This is a case in which the subsistence of the terms is perfectly clear. In *Hayter* v. *Rod* (2), it was decided that nothing is to be presumed in favour of the inheritance upon a question whether a term of years is to be considered as subsisting for the purposes for which it was created.

MINUTES:—"Declare that the terms of 1000 years and 500 years are valid and subsisting terms, and that the several sums of £4000 and £4000, with the interest thereon now owing, are valid and subsisting charges upon the hereditaments comprised in the said terms." Consequential relief.

Solicitors for the Plaintiff: Messrs. *Rickards & Walker.*

Solicitors for the Defendants: Messrs. *Watkins, Baker, & Baylis;* Messrs. *Stephens & Matthews,* for Messrs. *Wilson & Moorhouse, Congleton;* Messrs. *Wharton & Ford,* for Messrs. *Turnley & Sharman, Bedford*; Mr. *Gerard Ford.*

(1) 6 Ves. 364. (2) 1 P. Wms. 358—360.

V.-C. K.

1866

Jan. 22, 23, 24; March 24.

COOPE v. CRESSWELL.

Fraudulent Devises—3 Wm. & M. c. 14—Limitations, Statute of (3 & 4 *Wm.* 4, *c.* 42), *s.* 5—*Debt on Covenant—Mortgagee of Equitable Estate—Purchaser for value without notice—Party liable, payment of interest by—Laches.*

A testator by settlement, executed on the marriage of his son, covenanted for payment by himself, his heirs, executors, or administrators, during his life, or three months after his decease, of a sum of £3000 to the trustees of the settlement, with interest thereon till payment. The testator by his will devised certain real estates for payment of debts; and other real estates, then subject to an existing life interest, he devised to trustees in trust for his grandson for life, with remainders over. The grandson mortgaged his equitable life-interest for value. Interest was paid on the £3000 by the executors till 1849; but the £3000 not having been paid, and the personal estate, and estate devised for payments of debts, being exhausted, the trustees in 1863 instituted a suit to have the £3000 raised by sale of the devised estates:—

Held, that the £3000, though a debt due on covenant, and *debitum in præsenti solvendum in futuro*, was a debt within the statute 3 Wm. & M. c. 14.

That the fact that the testator had ample assets at the time of entering into the covenant did not take it out of the statute against fraudulent devises (3 Wm. & M. c. 14); it not being necessary under that statute, as it was under the statute of *Elizabeth* against fraudulent conveyances (13 Eliz. c. 5) that the devise should have been made with the intent to delay, hinder, or defraud creditors.

That the mortgage made by the grandson was not such an alienation as prevented the creditors from having their debts paid out of the estates in the hands of the alienee, the devisees in trust and not the equitable tenant for life, being the devisee within the meaning of that term in the statute of 3 Wm. & M. c. 14.

That, although some of the assets in the hands of the trustees might have been misapplied, the creditor was entitled to be paid out of any part of the estate, and therefore that was no reason why he should not be paid out of the devised estates, whatever remedies the devisees of those estates might have against the trustees for such misapplication.

That the fact that one of the original trustees with whom the covenant to pay the £3000 was entered into, who had been a receiver of the testator's estate during his lunacy, had not, out of moneys which he received as such receiver paid the debt due to himself and others under the covenant, was no bar to the present claim, he having no right to apply such moneys otherwise than as directed by the Court appointing him.

That the mortgagees could not be regarded as purchasers for value without notice.

That the fact of the interest having been paid on the £3000 by the trustees was sufficient to prevent the statute running in favour of the beneficial devisee—an executor in respect of the personalty, a devisee of estates devised for payments of debts in respect of such estates, and a beneficial devisee of realty, all coming within the term "party liable," under the 3 & 4 Wm. 4, c. 42, and payment by one being sufficient to prevent the statute running in favour of the rest.

That there had been no such laches as disentitled the Plaintiffs to relief.

The Court therefore declared the Plaintiffs entitled to have their debt raised by sale of the devised estate.

Rep. 2 Clark. 112.

THIS suit was instituted by trustees of a settlement under which *Estcourt Cresswell*, the testator in the cause, had covenanted to pay a sum of £3000, seeking to have that sum raised by a sale of certain real estates which the testator had devised by his will.

Estcourt Cresswell, by a settlement executed in May, 1815, on the marriage of one of his sons, covenanted for himself, his heirs, executors, and administrators with the trustees thereof, *Lawrence* and *Carter*, their executors, administrators, and assigns, that he, *Estcourt Cresswell*, would in his lifetime, or his heirs, executors, or administrators would within three months after his decease, pay or cause to be paid to them the sum of £3000, and would in the meantime, until payment, pay interest on the same at the rate of 5 per cent. per annum.

The testator, by his will dated in February, 1821, gave and devised to his trustees his *Pinkney* and other estates in *Wiltshire* upon trust for sale and payment of the mortgages thereon, and all other his debts and funeral and testamentary expenses. He also devised his estates in possession or reversion in the county of *Devon* to the same trustees in trust for his grandson, *Thomas Estcourt Cresswell*, for life, with remainder to his first and other sons successively in tail, and the testator gave and bequeathed the residue of his personal estate and effects to the same trustees in trust, subject to certain legacies and annuities, for the testator's sons equally.

The testator died in July, 1823. The trustees and executors of his will renounced probate and disclaimed the trusts thereof, and two new trustees, *Harrison* and *Thomas*, were subsequently appointed by the Court, and by an indenture dated in April, 1824,

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the devised estates became vested in them. They paid interest on the £3000 up to 1849.

The *Pinkney* estates having been so devised by the testator to trustees for payments of debts, they allotted a portion thereof, called the *Silkwood* estates, to the testator's eldest son in discharge of a legacy of £20,000 given to him by the testator's will. The eldest son sold the estate to his brother, *Thomas Cresswell*, who mortgaged it in 1834, and in the same year the mortgagees instituted a suit of *Gregory* v. *Cresswell* to realize their security, and to administer the testator's real and personal estate devised in trust for sale for payment of debts; but this suit did not affect the *Devon* estates. By a report made by the Master in *Gregory* v. *Cresswell* in 1850, he found that the trustees, *Harrison* and *Thomas* had received large sums on account of the testator's personal estate, and by sale of the *Wiltshire* estates, and that they had paid for or on account of debts due by the testator considerable amounts, including the amounts due on certain voluntary bonds and the interest thereon, given by the testator to some of his sons. These payments the Master allowed in account, but without prejudice to any question by creditors of the testator for value.

In 1822 the testator had been found lunatic, and in 1823, *Carter*, one of the trustees under the indenture securing the £3000, was appointed receiver in the lunacy; and he so continued till some years after the death of the testator, and as such received considerable sums on account of the testator's estate; but he never retained the sum due on the covenant, and he had concurred in the payment of certain voluntary bonds given by the testator.

The legal estate in the *Devon* estates was outstanding in 1814, and in that year a term of 1000 years was created to secure a sum of £13,000 charged on the property, and in 1860 an order was made in a suit of *Ellison* v. *Thomas*, vesting the legal estate in the termors, and, subject thereto, in *Thomas* the surviving trustee of the will in fee.

It appeared that the personal estate and realty devised for payment of debts were exhausted.

Thomas Estcourt Cresswell, by an indenture dated in February

1846, mortgaged his equitable life interest in the *Devon* estates to *Caldwell*, *Chilton*, and *Fuller* (three Defendants to the present suit), to secure certain sums not exceeding £10,000; but the legal estate still remained outstanding.

The *Devon* estates were, at the time of the testator's death, subject to the life interest of a Mr. *Fry* therein. Mr. *Fry* did not die till 1860.

The Plaintiffs, who were newly appointed trustees of the settlement of 1815, had received interest on the £3000 from the testator's trustees up to the year 1849; and, by an order in the suit of *Gregory* v. *Cresswell*, leave had been given to the Plaintiffs to institute this suit on behalf of themselves and the other specialty creditors of the testator to have their debts raised by sale of the *Devon* estates.

Mr. *Baily*, Q.C., Mr. *E. F. Smith*, Q.C., and Mr. *Eddis*, for the Plaintiffs:—

The debt on covenant, though *debitum in præsenti solvendum in futuro*, is a good debt as against the testator's real estate in the hands of the devisee under the statute of *William* and *Mary* (1): *Jenkins* v. *Briant* (2); and the alienation being only of an equitable and not of a legal estate, and not being for the payment of debts, the real estate in the hands of the assignee, although for value, is equally liable.

The *Statute of Limitations* is no bar to our claim. Interest was paid on the debt up to 1849 by the trustees, and that payment prevents the devisee from setting up the statute: *Roddam* v. *Morley* (3). It is immaterial whether all the personal or real estate devised for payment of debts has been exhausted: *Howard* v. *Chaffers* (4). Proceedings at law would lie against the legal devisee: *Tidd's* Practice (5).

[They also commented on *Morley* v. *Morley* (6); *Davies* v. *Nicolson* (7); *Hunter* v. *Nockolds* (8); *Elvy* v. *Norwood* (9); *Galton* v. *Han-*

(1) 3 W. & M. c. 14.
(2) 6 Sim. 603.
(3) 1 De G. & J. 1.
(4) 2 Dr. & Sm. 236.
(5) 8th ed. p. 1138.
(6) 5 D. M. & G. 610.
(7) 2 De G. & J. 693.
(8) 1 Mac. & G. 640.
(9) 5 D. G. & Sm. 240.

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cock (1); *Stronge* v. *Hawkes* (2); *Golder* v. *Golder* (3); *Sterndale* v. *Hankinson* (4).]

Mr. *Shapter*, Q.C., and Mr. *Prendergast*, for the heir-at-law, followed the same line of argument, and referred to *Willson* v. *Leonard* (5); *Walrond* v. *Walrond* (6); *Wrixon* v. *Vize* (7); *Pimm* v. *Insall* (8); *Walker* v. *Smalwood* (9); *Kinderley* v. *Jervis* (10).

Mr. *Glasse*, Q.C., and Mr. *Shebbeare*, for *Thomas Estcourt Cresswell*, the equitable tenant for life of the *Devon* estates, contended that there was no debt at the death of the testator which would bind the devised estate: *Morse* v. *Tucker* (11); and that the Plaintiffs had been guilty of laches: *Seton* on Decrees (12); *Gwynne* v. *Edwards* (13).

Mr. *Schomberg*, and Mr. *Dalton*, for *Caldwell*, *Chilton*, and *Fuller*, the mortgagees of the equitable tenant for life of the *Devon* estates:—

The *Fraudulent Devises Act* (14) is in *pari materiâ* with the *Fraudulent Conveyances Act* of *Elizabeth*, and a devise cannot be set aside under it unless proved to have been for the purpose of defrauding creditors: *Hughes* v. *Doulbin* (15); *Scarf* v. *Soulby* (16).

The debt being on covenant, and not being payable at the death of the testator, does not come within the statute of *William* and *Mary*. *Farley* v. *Briant* (17) and *Wilson* v. *Knubley* (18), both overruling *Jenkins* v. *Briant* (19).

The *Statute of Limitations* is a bar to the Plaintiffs' claim; and the payment of interest by the executor does not prevent its running

(1) 2 Atk. 428.
(2) 4 De. G. & J. 632.
(3) 9 Hare, 276.
(4) 1 Sim. 393.
(5) 3 Beav. 373.
(6) 29 Beav. 586.
(7) 2 Dr. & W. 192.
(8) 1 Mac. & G. 449.
(9) Amb. 676.
(10) 22 Beav. 1.
(11) 5 Hare, 79.
(12) Vol. i., p 48.
(13) 9 Beav. 22.
(14) 3 W. & M. c. 14.
(15) 2 Cox, 170.
(16) 16 Sim. 344.
(17) 3 Ad. & E. 839.
(18) 7 East. 128.
(19) 6 Sim. 603.

in favour of the beneficial devisee of realty: *Putnam* v. *Bates* (1); *Fordham* v. *Wallis* (2); *Dickenson* v. *Teasdale* (3); *Briggs* v. *Wilson* (4); *Jacquet* v. *Jacquet* (5).

The suit of *Gregory* v. *Cresswell* did not affect the *Devon* estates; but, even if it had done so, the mortgagees were purchasers for value without notice; and the fact that they were purchasers of an equitable interest only does not affect the question, there being no *lis pendens* registered or proceedings pending when they purchased: *Spackman* v. *Timbrell* (6); *Richardson* v. *Horton* (7); *Dilkes* v. *Broadmead* (8); *Jones* v. *Jones* (9); *Rooper* v. *Harrison* (10).

The Plaintiffs could not bring an action at law against the trustee.

Moreover, *Carter* being one of the original covenantees, having been a receiver of the testator's estate, ought to have paid himself out of moneys which came to his hands; and the trustees of the testator's will having misapplied the testator's assets in paying voluntary debts of the testator the specialty creditor cannot come against the *Devon Estate*, but must proceed against the trustees; and it appears that there are or may be still some assets of the testator outstanding which ought first to be made available.

[They also referred to *Vickers* v. *Oliver* (11), *Hunting* v. *Sheldrake* (12), and *Tyndale* v. *Warre* (13).]

Mr. *W. W. Cooper*, Mr. *Harrison*, Mr. *Bovill*, Mr. *Haddan*, Mr. *Jolliffe*, and Mr. *Villiers*, for the other Defendants.

Mr. *Baily*, in reply, referred to *Chinnery* v. *Evans* (14), *Jeffreson* v. *Morton* (15), *Solley* v. *Gower* (16), *Bullen & Leake's* Pleading (17).

(1) 3 Russ. 188.
(2) 10 Hare, 217.
(3) 1 D. J. & S. 52.
(4) 5 D. M. & G. 12.
(5) 27 Beav. 332.
(6) 8 Sim. 253.
(7) 7 Beav. 112.
(8) 2 Giff. 113; S. C., affirmed on app. 7 Jur. (N. S.) 56.
(9) 8 Sim. 633.
(10) 2 K. & J. 86.
(11) 1 Y. & C. Ch. 211.
(12) 9 M. & W. 256.
(13) Jac. 212.
(14) 11 H. L. C. 115.
(15) 2 Saund. 8*i*.
(16) 2 Vern. 61.
(17) 2nd ed. p. 509.

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March 24. SIR R. T. KINDERSLEY, V.C.:—

This suit is instituted to have the sum of £3000, due on covenant, raised by sale or mortgage of the testator's *Devon Estate*. At first sight it would appear almost a matter of course that the Plaintiffs should have that relief, the personal estate being insufficient; but various defences have been raised which it is necessary that I should consider in detail.

The first ground of defence raised was, that the liability of the testator under the covenant in the settlement of 1815 does not come within the meaning of the term *debt* in the statute 3 Wm. & M. c. 14, though it is admitted that if it had been created by bond instead of covenant, it would have come within that statute. Several cases have been cited in which liabilities on covenant have been held not to come within that statute. But when those cases are examined it will be found that in all of them the covenant was, not to pay a sum certain, but to do or abstain from doing some act, or that something should or should not occur; as for example a covenant for title, or a covenant to repair; and in such cases there is no debt until a breach of covenant has occurred and the damages are ascertained; and it has been held that such a liability does not come within the statute. But here there is a case of as clear a debt as it is possible to have, it being a covenant that the testator in his lifetime, or his heirs, executors, or administrators within three months after his decease will pay a specific sum of £3000; and further that until it has been paid the testator will pay interest at 5 per cent. on that sum, *debitum in præsenti*, although *solvendum in futuro;* and it appears to me that this is not less a debt because payment is postponed. *Jenkins* v. *Briant* (1) is perhaps the nearest case to the present. That was a stronger case than this, being a covenant to pay an annuity, that is, so many fixed sums *de anno in annum*. The payments were duly made during the testator's lifetime, but after his death a half-yearly payment was not forthcoming; and it was held that the liability on that covenant was a debt within the statute of 3 Wm. & M. c. 14. I have no hesitation therefore in holding that in the present case there is a debt within the meaning of that statute.

(1) 6 Sim. 603.

The next defence raised was, that the devise of the *Devon* estate cannot be considered a *fraudulent devise* within the statute of *William* and *Mary*, because the testator had ample assets to satisfy his debts; viz., his personal estate and the *Pinkney* estates devised for the payment of his debts. And it is contended that the same principle must be applied to the statute of *William* and *Mary* as to the statute of *Elizabeth* against fraudulent conveyances, under which, if a man makes a voluntary settlement, and at the time has ample assets to pay his debts, such settlement, though voluntary, would not be held fraudulent. But I am of opinion that that contention cannot be supported. The statute of *Elizabeth* enacts, that a conveyance made with the intent to delay, or hinder, or defraud creditors, is fraudulent and void as against creditors, and in order to bring a conveyance within that statute it must be shewn to have been executed with that intent. But in the Act of *William* and *Mary* the language used is quite different, and this Act was passed for a totally different purpose. The object of the statute of *William* and *Mary* was, as regards creditors, to place devised estates on the same footing as descended estates, and therefore it enacts, that the devise shall be *ipso facto* void as against creditors, and it does not require it to be shewn that the intent of the devise was to defraud, or hinder, or delay creditors. It therefore appears to me that this defence cannot prevail.

The next defence is this: the *Devon* estate was devised to trustees in trust for *Thomas Estcourt Cresswell* for his life, and *Thomas Estcourt Cresswell* has mortgaged his equitable life interest to persons now represented by the Defendants *Caldwell* and others; and it is insisted that the creditors cannot, as against the alienee of the devisee, avail themselves of the statute of *William* and *Mary*, inasmuch as that statute, although it gives a remedy against the devisee, does not give a remedy against the devisee's alienee where the alienation has taken place before action brought. And it is contended that *Thomas Estcourt Cresswell* being the beneficial devisee of the estate, the alienation by him by way of mortgage prevents specialty creditors having any remedy against the estate in the hands of the alienees. But it appears to me that the equitable tenant for life is not the devisee within the meaning of the statute of *William* and *Mary*. If an action

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were brought by specialty creditors under that statute to make the estates devised available, such action would be brought, not against the equitable tenant for life, but against the person to whom in the eyes of a court of law the estate is devised, namely, the devisee of the legal estate. And it appears to me impossible to hold that the alienation, which is only by the *cestui que trust* for life, is such an alienation as to destroy the remedy given to creditors by the statute of *William* and *Mary*.

The next point raised was, that there may still be some personal estate to be realized, and that until that is ascertained and realized the Court ought not to apply the devised real estate. I quite admit the truth of that as a general proposition; but forty years having elapsed since the death of the testator, and the last thirty years having been occupied in endeavouring to realize and administer the testator's personal estate, as well as the proceeds of the estates devised for payment of debts, I do not think the Court ought to refuse relief to creditors because it is suggested that there may be assets which may possibly, by means of some fresh proceedings, be realized; and it appears to me that the creditors are now entitled to be paid out of the *Devon* estate.

The next defence was, that the administrators and trustees of the testator's estate had received moneys which they ought to have applied in payment of this debt; and that the *Devon* estate ought not to be applied in payment of debts which ought to have been paid out of moneys in the hands of the trustees, but which moneys were applied by them in payment of debts over which the debt in question had priority. But that is no reason why the specialty creditor should not be paid; he is entitled to be paid out of any assets; and it was no fault of his that the trustees misapplied the funds in their hands; and whatever remedies the devisees of the *Devon* estate may have against the trustees, it appears to me that the creditors are entitled to be paid out of that estate.

The next defence raised was, that *Townsend* and *Carter* having been the original covenantees whom the Plaintiffs now represent, *Carter*, one of them, was, a short time before the testator's death, appointed receiver in the lunacy of the testator, and so continued till some years after the testator died; and that, as such receiver, *Carter* received moneys of the testator, including rents of the

estate devised for payment of debts, and that, out of such moneys he ought to have paid or retained the debt due to himself and *Townsend* under the covenant; and that, not having done so, he and *Townsend*, and the persons now representing them, have no title to relief. But that argument, though very ingenious, appears to me to be perfectly untenable. A receiver has no right *ex mero motio* to apply the moneys in his hands in payment of debts due either to himself or to other persons; he has no right to apply such moneys otherwise than as the Court or tribunal appointing him may direct. This, therefore, also appears to me no reason for holding that the Plaintiffs are not entitled to the relief they seek.

Another contention raised was, that the Defendants, the mortgagees of the equitable life interest in the *Devon* estate, are in the position of purchasers for valuable consideration without notice, and that on that ground the Plaintiff has no remedy against them. But when we come to consider of what they are purchasers, and what notice they must be deemed to have had, that contention cannot stand. They are purchasers of an equitable life interest, the legal estate in fee being in trustees, for the benefit of the tenant for life, whose estate the Defendants have purchased, and of those in remainder. And are they purchasers without notice? The claim of the Plaintiffs is a specialty debt, and not a charge upon the estate. Moreover, the mortgagees had notice that the *Devon* estate, the equitable life interest in which was mortgaged to them, was devised by *Estcourt Cresswell*, and they had notice of his will. That will could shew them that there was a devise of some other real estate for the payment of debts, besides personal estate applicable for the same purpose. I will assume that they did not know of the existence of this, or of any other particular debt; but they must have known that, at all events, the testator *might* have owed some debts when he died; and they had notice that it might be necessary to resort to the *Devon* estate for the payment of the testator's specialty debts. I can understand a person taking a conveyance of a legal estate upon which there is an equitable charge, without having notice of that charge, claiming the benefit of a purchase for valuable consideration without notice; but I cannot understand the case of a purchaser of an equitable life interest only being in a position to say, as against a specialty

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creditor, whose right is a legal one, that he has no notice. Although the Defendants had no notice of this particular debt, they must have known that there were, or might be, debts, and that is sufficient.

The next point raised, and this, I think, was considered by the learned counsel for the Defendants as the most important point in the case, was the *Statute of Limitations*. The Defendants, who raise this question, insist that as more than twenty years have elapsed since the devise of the *Devon* estate took effect, without any attempt having been made to make that estate liable for the specialty debts, they are entitled to the benefit of the *Statute of Limitations*. The Plaintiffs answer that interest upon this debt has been paid within twenty years by those who were the administrators, and the trustees of the estate devised for payment of debts. The Defendants reply that, assuming such payment to have been made within twenty years by those persons, it does not prevent the statute from running in favour of a devisee of the *Devon* estate, no payment having been made by him or by anybody on his behalf. The question then resolves itself into this, whether payment of interest within twenty years by those whose duty it was to apply the personal estate, and the proceeds of the sale of the *Pinkney* estate, in payment of debts, prevents the devisee of the *Devon* estate from setting up the statute.

Now the *Statute of Limitations*, upon which the question turns, is the statute of the 3 & 4 Wm. 4, c. 42; the statute 3 & 4 Wm. 4, c 27, has really nothing to do with this case. With the single exception of a legacy, which seems to have been introduced into the Act by a blunder, no claim for money comes within chapter 27, but that which is a charge upon land; and the statute of *William* and *Mary* does not make specialty debts a charge upon the land devised.

What then is the effect of the statute 3 & 4 Wm. 4, c. 42? I need hardly observe that until this statute was passed, there was no statute of limitations in any way relating to specialty debts. This statute imposed the first specific bar of time as to specialty debts. Prior to this statute Courts of law and Courts of equity established twenty years as a period after which they would presume payment; thus creating a kind of fiction for the purpose

of working out justice; but there was no statutable bar in respect of time. By Section 3 of this statute, which first introduced the bar with respect to specialty debts, it is enacted that all actions of debt upon any bond or other specialty, must be brought within twenty years after the cause of such action, but not after; and by Section 5, upon which this question turns, it is provided that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such debt, or his agent, or by part payment, or part satisfaction on account of any principal or interest then due thereon, it shall be lawful for the party entitled to such action to bring his action within twenty years after such acknowledgment by writing, or part payment, or part satisfaction. The extremely inaccurate and ambiguous language which is here used has often been remarked upon; and it has been observed very justly that the framer of this clause seems to have had in his contemplation nothing but the simple case of a debtor still living, and his specialty creditor. It seems not to have occurred to him that it was necessary to provide for the case of the debtor dying; in which case if the debtor, as in the present case, left personalty, a real estate devised for payment of debts, and also real estate devised beneficially, there would be not merely one party but three parties liable; for this case the language of the section makes no express provision, for it uses only the singular number, "the party liable."

Two questions then present themselves; where the debtor is dead, having left personal estate, and real estate devised for payment of debts, and also real estate devised beneficially; 1st, who are or is meant by the "party liable by virtue of such speciality;" and 2ndly, supposing there are more than one party liable, whether a payment or acknowledgment made by one party liable will prevent the running of the statute only with respect to the party making the payment or giving the acknowledgment, or with respect to all the parties liable. And I will first consider these questions as if they were entirely unaffected by decision.

Where the original party liable, the debtor himself, is dead, there are three parties, each of whom is liable to the claims of a specialty creditor—the executor in respect of the personalty, the trustees in respect of the real estate devised for payment of debts,

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and the beneficial devisee in respect of the real estate beneficially devised. And upon the language of the Act I should come to the conclusion that each of them is a party liable within the meaning of the 5th section; and that a payment or an acknowledgment by any one of them is a payment by the party liable by virtue of the specialty. I think it is quite clear that the statute was never intended to apply only to the case where the debtor was still living; it was clearly meant to apply just as much to a case where the debtor was dead, although it did not occur to the mind of the framer of the statute to use language properly applicable to that case. On the other hand I cannot think that it would be a right construction to hold that all the three parties before mentioned together constitute the party liable, so that they must all join together in making the payment or giving the acknowledgment in order to render it effectual. It appears to me, upon this particular question, that if any one of these parties makes the payment, or gives the acknowledgment, it is a payment or acknowledgment by the party liable by virtue of the specialty.

The second is a more difficult question, namely, supposing any one of the parties liable (say the executor) pays interest or part of the principal within twenty years, is that to have the effect, according to the language used in the 5th section, of preventing the bar of the statute as respects all the parties liable, or is it to have the more limited effect of preventing the bar of the statute only *quoad* the party marking such payments? What is the language of the 5th section? It shall be lawful for the party entitled to such actions to bring his action within twenty years after such acknowledgment or payment. What action? Surely it must be the same action which he might have brought if the twenty years had not elapsed since the cause of action; and that action he shall still be entitled to bring, notwithstanding twenty years have elapsed since the cause of action, provided within twenty years there has been an acknowledgment or payment. That according to the language used would appear to me to be the fair interpretation of the section, and I see no reason for importing (what the argument for the Defendants asks the Court to import), a limitation on the generality of the terms used in this

section. I am asked to insert these words: "It shall be lawful for the party entitled to such action to bring his action against the person who has made the acknowledgment or payment within twenty years. It is contrary to the plainest course of construction to introduce such language into an Act of Parliament, or any other instrument, unless driven to it by necessity arising out of the context; and I see no such necessity here. Is there anything unjust or unreasonable in such a construction of the statute?

A debtor dies, having by his will devised real estate for the payment of his debts, and devising other real estate beneficially and leaving personal estate; if the executors, or trustees of the estate devised for payment of debts, make a payment on account, is there anything unreasonable or unjust in saying that that payment shall keep alive to the creditor the right to all the remedies which he would have had supposing the twenty years had not elapsed? Why should the creditor, having received part payment from the executor, be under the necessity, in order to keep alive his remedy against the real estate devised for payment of debts, and against the real estate beneficially devised, of bringing his action or suit against the trustees or the beneficial devisee? It would not be for the benefit of the devisee that the creditor should be driven to that necessity. I do not see anything unjust or unreasonable in that construction of the statute, which, as it appears to me, is most consistent with the language used.

Let me now consider the authorities bearing upon the question. One case cited was *Putnam* v. *Bates* (1). That was a suit by a simple contract creditor against the executrix and the devisee, seeking to make the real estate liable, under the Act of the 47th Geo. 3, which made a trader's real estate liable to his simple contract debts. The executrix had paid part of the debt within six years; and it was held that that payment did not prevent the statute of *James* running in favour of the devisee. At first sight that appears to be a case in point; but when it is examined it loses all bearing upon this case. The reason of that decision was, that under the statute of James there was no provision with regard to acknowledgment, or part payment, within six

(1) 3 Russ. 188.

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years. So far as the language of the Act went, if six years had elapsed, although interest might have been paid by the executor up to the last hour, the executors who paid it might have set up the statute. The Courts, not only of equity but of common law, saw the injustice of such a state of the law, and therefore they devised this plan in order to do justice; they treated the part payment of principal, or payment of interest, not only as an acknowledgment by the executors of the existence of the debt, but as a new promise to pay the debt, that is, as a new cause of action; and then the statute gave the creditor six years from that new cause of action, within which he might sue the executor. But a promise by the executor to pay the debt could not constitute a promise by the devisee of the real estate; and therefore there was no new cause of action as against the devisee. It is obvious that that case has no application to the present, because we are under a different statute, which has a special provision with regard to payment within twenty years.

The next case cited was *Fordham* v. *Wallis* (1), and there it was held, as in *Putnam* v. *Bates*, that payment of interest within six years by the executor, did not prevent the statute of James from running in favour of the devisee. And so again in the case of *Briggs* v. *Wilson* (2).

The next case was that of *Dickenson* v. *Teasdale* (3). There the testator devised an estate, say Blackacre, to *A.*, charged with half his debts, and Whiteacre to *B.*, charged with the other half of his debts. It was not that each estate was liable to all the debts, but each estate was liable only to one-half of the debts; and therefore the one estate was not liable for the same moiety of the debt for which the other was liable. In that case it was held that the payment by *A.* did not prevent the statute from running in favour of *B.* That is a very different case to the present. I am bound, however, to admit that Lord *Westbury*, who decided that case, seems to have entertained a doubt at least, whether a payment or acknowledgment by the executor would be sufficient to prevent the statute from running in favour of the devisee. I think that this opinion must be inferred from the language used by his Lordship; but it is not a decision. On the other hand we have the case of *Roddam* v.

(1) 10 Hare, 217. (2) 5 D. M. & G. 12. (3) 1 D. J. & S. 52.

Morley (1), which is a very important case, one most elaborately and carefully considered by the present Lord Chancellor, who, when it first came before him, finding the difficulty of it, called to his assistance two common law Judges, Mr. Justice *Williams* and Mr. Justice *Crowder;* and the case was heard before his Lordship, with the assistance of those two learned Judges. Those learned Judges took time to consider the case, and then Mr. Justice *Williams* gave the opinion of himself and of Mr. Justice *Crowder*, and a most carefully and elaborately considered opinion it was, pointing out all the difficulties, and reviewing all the arguments which might arise in favour of the one view or the other. The point actually decided was, that an acknowledgment or payment by the tenant for life of the devised estates would prevent the statute from running in favour of the remainderman. But on reading through the opinion of Mr. Justice *Williams* and Mr. Justice *Crowder*, as delivered by the former, it appears to me that every word of the reasoning is applicable to the present just as much as to that case; and after the most careful deliberation, they arrived at the conclusion that the payment or acknowledgment by one party liable prevents the statute from running in favour of another party liable. Having had the benefit of that opinion, the Lord Chancellor took further time to deliberate, and subsequently pronounced his judgment in accordance with the views of those learned Judges.

I will refer to one portion of the Lord Chancellor's judgment, because it appears to me to put the matter in a clear and satisfactory light. [His Honour read passages from the judgment, commencing at page 18, and continued:] The Lord Chancellor was there using general language, and referring to any case which might occur of several persons liable; and he came to the conclusion, on the language used and on principle, that if there are several persons liable, whether it be the case of several obligors in a bond, or the case of a deceased debtor having left personalty and devised realty, in short wherever there is a case of several persons liable, although the language of the statute has not expressly provided for that case, yet according to its true construction the person liable means each or any one of the several persons liable, and an acknowledgment

(1) 1 D. G. & J. 1.

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or payment by any one of them within twenty years prevents the statute from running in favour of any of them.

In this state of the authorities, I think I am justified in holding that the Defendants cannot plead the *Statute of Limitations*.

Another argument raised, on the part of the Defendants, was this, that the Plaintiffs have been guilty of such laches that they ought not now to have any remedy in this Court. The laches suggested is, that they have not done what they ought to have done, or might have done, in getting payment out of the personal estate, or the proceeds of the *Pinkney* estate sold for the payment of debts; and moreover that they have not been sufficiently active in endeavouring to make the *Devon* estate liable. Now with regard to their not being sufficiently active in getting payment out of the personal estate, or the purchase money arising from the estate devised for payment of debts, I do not see what they ought to have done which they have not done. They received payment of interest at least down to 1849; it was no fault of theirs that those funds were misapplied. The suit of *Gregory* v. *Cresswell* was framed with a view to have those funds applied in payment of the debts; and the decree directed all proper accounts and inquiries for that purpose.

Then as to the laches imputed, of not taking steps to make the *Devon* estate liable, in the first place it strikes me that this is not very consistent with another argument to which I adverted before —namely that the Plaintiffs ought not to seek to make the *Devon* estate liable until every part of the personal estate and of the *Pinckney* estate has been realised. By that argument the Defendants insist that the Plaintiffs are coming against the *Devon* estate too soon; by the argument now under consideration they insist that the Plaintiffs have come too late. There is not much consistency in those two arguments. It appears to me, however, that there is no laches here at all. There was a suit to adminster the personal estate and the proceeds of the *Pinkney* estate; and it appears to me that the creditors were justified in abstaining from taking proceedings against the *Devon* estate as long as there was any reasonable chance of getting payment out of the personal estate and the proceeds of the *Pinckney* estate.

Moreover, the testator's interest in the *Devon* estate, and therefore the devisees' interest therein, was only an estate in remainder or reversion, expectant on the death of Mr. *Fry*, who was tenant for life thereof; and while Mr. *Fry* was living, and while the devisees' interest in the *Devon* estate was still merely reversionary, it would have been a very harsh and unreasonable measure for the creditors to have attempted to force that reversionary interest to a sale, when it must have been sold so disadvantageously for the devisees.

It so happened that Mr. *Fry* lived to a very great age; I think he was eighty years old in the year 1857, and he lived until 1860; and until the estate fell into possession I do not think it could be imputed to any specialty creditor that he was guilty of delay in not attempting to have that estate sold for payment of his debt.

I am of opinion that the Plaintiffs are entitled to a decree.

Solicitors for the Plaintiffs: Messrs. *Bolton & Filder.*

Solicitors for the Defendants: Messrs. *Gibbs & Tucker;* Messrs. *Bloxam & Co.;* Messrs. *Bower, Son, & Cotton;* Messrs. *Whitakers & Woolbert;* Messrs. *Young, Maples, Teesdale, & Nelson;* Messrs. *Robinson & Tomlin;* Messrs. *Hollings, Sharp, & Ullithorne;* Messrs. *Walters, Young, & Walters.*

LETTON *v.* GOODDEN.

Ferry, right of—Ancient Ferry—Monopoly—Bill of Peace.

An Act of Parliament authorized the *Watermen's Company* to appoint watermen to ply on Sundays, within certain limits, from such common stairs or places of plying on the *Thames* as might be appointed, and provided that if any person except so appointed should ply for hire on Sundays from such appointed plying places, he should incur for each offence a penalty of 40*s*. The Act also provided for the leasing of the right to ply on Sundays at plying places, and that the profits or rent of the Sunday ferries should be applied for the relief of aged and sick watermen.

Upon Bill by a lessee from the *Watermen's Company* of the right of plying on Sundays from certain stairs to a certain point across the river, claiming a

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right of ferry, and seeking to restrain a new ferry, which had been established fifteen yards from his ferry:—

Held, that if the Plaintiff had the right he alleged, he might come to the Court to quiet such right, and would not be left constantly to insist on the penalties imposed by the Act; and that the new ferry was so near the Plaintiff's that the Court would have restrained it; but that the Plaintiff's right relating only to Sundays, and he being under no obligation to keep up the ferry, but being free to abandon it at any time, his right did not stand upon the same footing as an ancient ferry The Court therefore dismissed the Bill with costs.

THE object of this suit was to restrain the Defendants from interfering with the Plaintiff's right of conveyance on Sundays across the river *Thames* from *Greenwich* to the *Isle of Dogs*.

By the *Watermen's and Lightermen's Amendment Act*, 1859 (1), under which the *Watermen's Company* was at present constituted (the former Acts relating to the company being repealed), after providing that the Act should extend to all parts of the river *Thames* from *Teddington Lock* to *Lower Hope Point* near *Gravesend*, it was enacted that it should be lawful for the Court of Watermen from time to time, and as often as they should think proper, to name, place, and appoint plying places, and inspectors of plying places and causeways, adjoining or near unto the river *Thames*, and of passenger and other boats and wherries used for the carrying and conveying of persons over the said river for hire, and allow them such salaries or wages as they might think proper. The Act further provided that the Court of Watermen might, in their discretion, appoint any number of watermen to ply and work on Sundays on the river *Thames*, between *Chelsea* and *Bow Creek*, at such common stairs or places of plying as the Court might think fit, so as not to interfere with any private ferry, and pay such sums of money as compensation for their services to such watermen as might be agreed. That no sum exceeding 2*d.* should be taken by any waterman so authorized to ply on Sundays, for carrying any person across the river, under a penalty for each offence of not exceeding £5. That all sums received by any waterman so appointed to ply on Sundays, should on the Monday following, or other time to be appointed by the Court, be paid by him to the clerk or other appointed

(1) 22 & 23 Vict. c. cxxxiii.

officer of the company; and the surplus of such sums, after deducting the sums paid by the company to the waterman for his services, or the rent received for the ferries, if let as thereinafter provided, should be applied by the company "to the use of the poor, aged, decayed and maimed watermen and lightermen of the said company, and their widows, at the discretion of the said Court of Master Wardens and Assistants." The Act then provided for the letting to farm the plying or working on Sundays at common stairs and ferries, and for the regulation of the plying places and ferries. By the 40th section it was provided as follows:—

"If any freeman or apprentice, or other person, unless he be appointed by the said Court as aforesaid, plies for hire, or takes, or carries for hire on a Sunday, at or from any common stairs or place of plying on either side of the said river at which the said Court appoints watermen to ply and work as aforesaid, any fare or passenger across the said river, or to either of the two common stairs or places of plying on the opposite side of the said river next above or next below the stairs or place at which such appointed or licensed waterman plies, or to any place or places to which the fares and passengers taken at such several and respective common stairs and places of plying are usually conveyed by the watermen appointed by the said Court to ply and work, or to or from any ship or craft lying or being on the said river within the distance of such two other stairs or places of plying, he shall incur for each offence a penalty not exceeding forty shillings."

The Act also empowered the Court of Watermen to make bye-laws for the government and regulation of lightermen and watermen, and for carrying into effect the purposes of the Act.

Shortly after the passing of the Act, certain bye-laws were made, one of which was that if any freeman or his apprentice, or the apprentice of any widow of a freeman or other person, should on a Sunday ply for, take, or carry any fare or passenger across the river, or to any ship or vessel, at or from any place set forth or marked by the Court, he should forfeit and pay for every such offence any sum not exceeding forty shillings.

The bill alleged that at *Greenwich* there had been from time

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immemorial various common stairs and places of plying, and among them two called *Billingsgate Dock Stairs* and *Garden Stairs*, and that the Company of Watermen had for many years been in the habit, in pursuance of their Act, of appointing watermen to ply and work on Sundays there, and of letting to farm the plying and working on Sundays at such stairs.

By an indenture, dated 25 March, 1865, the company let to the Plaintiff, *Charles Letton*, the plying and working on Sundays at and from *Billingsgate Dock Stairs* and *Garden Stairs* to *Potter's Ferry* on the north side of the river, and from *Anchor Stairs*, *Union Stairs*, and *Agamemnon Stairs*, on the south side, to the *Isle of Dogs* on the north side of the river, and to and from all ships and vessels being on the river there, for one year from the date thereof, if the Plaintiff should so long live, at the rent of £89 10*s.* 6*d.*, and the lease provided that, if *Letton* died, the remainder of the term should be vested in some person in trust for his widow.

The bill alleged that the Plaintiff had properly maintained the ferry, and that by virtue of his lease he was exclusively entitled on Sundays to convey persons across the river from the stairs named in his lease across the river, or to the *Isle of Dogs*.

The *Potter's Ferry Society* were the owners of an ancient ferry called *Potter's Ferry*, extending from *Potter's Ferry* on the *Isle of Dogs* to *Garden Stairs* at *Greenwich*, and they claimed to be exclusively entitled to carry passengers, both on week days and Sundays, from *Potter's Ferry* on the north side to *Greenwich*, but they were not by virtue of their ferry entitled exclusively to carry passengers back from *Greenwich* to the *Isle of Dogs*. The *Potter's Ferry Society* leased their ferry to the Defendants *Goodden* and others; and the Defendants on the 7th of May, 1865, commenced running a steamboat and carrying passengers for hire between *Greenwich Pier* and the *Isle of Dogs* on Sundays. *Greenwich Pier* was not a place at which waterman had been appointed to ply and work on Sundays, but it appeared that it was distant only fifteen yards from *Garden Stairs*, and seventy yards from *Billingsgate Dock Stairs;* and the place at which the Plaintiff landed passengers on the *Isle of Dogs* on Sundays was not at *Potter's Ferry*, but within a distance of only a few yards from *Potter's Ferry*.

The bill alleged that the Defendants by so running their steamboats on Sundays were diverting the Sunday traffic from *Garden Stairs* and *Billingsgate Dock Stairs*, and depriving the Plaintiff of large numbers of persons who, on Sundays, would otherwise have come to the Plaintiff's plying places, and so destroying the value of the Sunday ferries from *Garden Stairs* and *Billingsgate Dock Stairs* to *Potter's Ferry Stairs*, and the bill prayed an injunction to restrain the Defendants from so carrying passengers on Sunday from *Greenwich Pier*, or the Plaintiff's plying places, to the *Isle of Dogs*.

Mr. *Glasse*, Q.C., and Mr. *Lindley*, for the Plaintiff:—

The Plaintiff as lessee from the *Watermen's Company*, has a right of ferry under their Act of Parliament which this Court will protect. The Defendants or their lessors, have only a right of ferry from *Potter's Ferry* to *Greenwich*, and not the other way; this was decided in *Giles* v. *Groves* (1), and it is only a right of ferry from *Potter's Ferry Stairs*, and not from the whole of the *Isle of Dogs*: *Newton* v. *Cubitt* (2).

The ferry established by the Defendants, is so near the Plaintiff's ferry, though not exactly between the same *termini*, that it is, in fact, a rival ferry, and draws away from the Plaintiff's ferry the traffic which would otherwise flow to it; it is therefore an interference with the Plaintiff's ferry, and amounts to a nuisance, *Viner's* Abridgment (3). For such an interference an action on the case would lie; and this Court will by injunction interfere to restrain the continual interference, and will not leave the Plaintiff to proceed *de die in diem* to enforce the penalties provided by the Act of Parliament.

In *Churchman* v. *Tunstal* (4), although an injunction was refused on the case reported, it was afterwards granted in favour of the same Plaintiff; that case, therefore, is an authority in our favour. This appears from *Huzzey* v. *Field* (5), and *Attorney-General* v. *Richards* (6). The real question is, whether the

(1) 12 Q. B. 721.
(2) 12 C. B. (N. S.) 32; S. C. on Ap. 13 C. B (N. S.) 864.
(3) Vol. xvi. p. 26, Nuis. G. 4.
(4) Hardr. 162.
(5) 2 C. M. & R. 432.
(6) 2 Anstr. 616.

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Defendants' ferry is so near the Plaintiff's ferry as to divert the traffic, and the Courts have interfered in cases where the distance from the old ferry was much greater than in the present case: *Peter* v. *Kendal* (1); *Pim* v. *Curell* (2).

The profits of the ferry are dedicated to a charity, and, therefore, it is for the public benefit.

Mr. *Baily*, Q.C., and Mr. *Kay*, for the Defendants:—

The cases cited on the other side do not apply; they all relate to ancient ferries, and there is nothing of the kind even alleged here. The right claimed by the Plaintiff is a statutory right under the Act of Parliament, and even under the Act it only arises by implication from the 40th section, which is a restrictive clause, and must be construed strictly, being in derogation of the public right; and the Court will ascertain the intention of the Act from the terms used: *Fordyce* v. *Bridges* (3).

The right claimed by the Plaintiff only relates to Sundays, and is not good as a right of ferry. Moreover, in order to constitute a ferry, there must be corresponding obligations on the owner of the ferry to maintain it properly: *Glen's* Highway Laws (4); but there is here no obligation on the Plaintiff to keep up the ferry; he might at any time cease to keep up the ferry at *Garden Stairs*, or at any place within half a mile of that point; and while he continues it as a ferry, he is under no obligation to provide proper boats, &c. The grounds upon which the Courts interfere to protect an ancient ferry are, that it is for the public convenience that the ferry should be maintained, as forming part of the king's highway; and as the owner of the ferry is at the expense of keeping up the ferry under penalty of being "grievously amerced," *Viner's* Abridgment (5), the Courts have considered that it would be unjust to allow another person to share the profits who does not also share the burthen; but neither of these reasons exists here.

The termini, from and to which the Defendants are plying, are not places marked out by the *Watermen's Company* as provided by the Act, and there is nothing to prevent the Defendants from so

(1) 6 B. & C. 703. (2) 6 M. & W. 234. (3) 1 H. L. C. 1.
(4) 2nd ed. p. 202. (5) Vol. xvi. p. 26, Nuis. G. 4.

plying; there being nothing fraudulent in what they are doing, *Tripp* v. *Frank* (1). There is nothing to prevent any person from carrying passengers from private property on the river, and *Greenwich* pier is private property; and our ferry is not so near as to be an interference with the Plaintiff's ferry; but if it were, and if we diverted the whole of the traffic from the Plaintiff's ferry, we are only doing what we are entitled to do, and it is *damnum absque injuriâ* (2).

The only case where this Court has interfered to protect a ferry, is the case cited from *Hardre's* Reports; but that is a doubted authority.

The Act of Parliament in the 40th section provides a remedy by penalties on persons other than those appointed as therein provided plying on Sundays; and the Plaintiff must resort to the remedy there provided, and cannot come to this Court for relief.

The fact that the profits of the Sunday ferry are devoted to charity, is not such a public benefit as will induce the Court to restrain the interference with such ferry.

Mr. *Glasse*, in reply:—

The fact of a penalty being provided by the Act is no reason why the Plaintiff cannot come to this Court to prevent the continual interference with his ferry: *Cory* v. *Yarmouth and Norwich Railway Company* (3).

We do not claim the right to an ancient ferry, our claim is founded on the Act of Parliament; it is a right conferred by competent authority, and that right this Court will protect. The obligation to keep up the ferry is not a part of the custom, but it is an incident to the keeping of the ferry, per *Holt*, C. J., in *Payne* v. *Partridge* (4). In an anonymous case (5) the Court refused to interfere, because it did not appear that the ferry was properly maintained; but here that fact is alleged in the bill and not being denied, it must be taken to be true. Every person plying on the river except within a ferry must have a license: *Matthews* v. *Peache* (6).

(1) 4 T. R. 667.
(2) Bl. Com. vol. iii. 219.
(3) 3 Hare 593.
(4) 1 Show. 231.
(5) 1 Ves. Sen. 476.
(6) 5 E. & B. 546.

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March 21.—Sir R. T. KINDERSLEY, V.C., after stating the facts of the case, continued:—

Several questions have been raised. It is contended for the Defendants that, irrespective of the question whether the Plaintiff has the right which he claims, he has no right to file a bill in this Court for relief, but that he must pursue the remedy given him by the Act of Parliament, which does not in terms prohibit the carrying of passengers, but only imposes a penalty in respect of each passenger carried. But I am of opinion that the Plaintiff, if he has the right which he claims, is entitled to file this bill, which is in the nature of a Bill of Peace, to quiet his right; and that he is not bound from time to time to try the question by proceedings to enforce the penalty.

Another defence raised was this: It was said that, assuming that the Plaintiff's right stood upon the same footing as the right to an ancient ferry, the proximity of *Greenwich Pier* to *Garden Stairs* is not such that the acts of the Defendants would be a disturbance of the Plaintiff's right which this Court would interfere to restrain. I think, however, that the acts of the Defendants are such a disturbance of the Plaintiff's right (assuming it to exist) as to constitute a nuisance from which this Court would protect the Plaintiff. Several cases have been cited on the point, in one of which it was questioned whether a distance of two miles was too great for the act to be a disturbance; and in another case eighty yards was held not to be too distant.

The remaining and most important question is, whether the right conferred on the Plaintiff by the Act of Parliament stands upon the same footing as the right of the owner of an ancient ferry; or, if it does not, whether the Defendants in carrying passengers from *Greenwich Pier* have infringed the right conferred by the Act of Parliament. The Plaintiff contends that his right, if not strictly a right of ferry, is tantamount to it; and, *quoad* the question in this suit, the same.

A ferry has been said to be the continuation of a public highway across a river or other water for the purpose of public traffic from the termination of the highway on the one side to its recommencement on the other side; and as such the existence of a ferry

is obviously for the benefit of the public. The advantage to the public is so great that the Crown has from time to time granted rights of ferry, and all common ferries have their origin in royal grant, or in prescription, which presumes such grant.

Such a right of ferry is an exclusive right or monopoly, and, as such, it is in itself an evil, being in derogation of common right, for by common right any person may carry passengers across a river. But as a compensation for that derogation of common right, there is this great advantage to the public, that they have at all times at hand, by reason of the ferry, the means of travelling on the King's highway, of which the ferry forms a part; for the owner of the ferry is under the obligation of always providing proper boats, with competent boatmen, and all other things necessary for the maintenance of the ferry in an efficient state and condition for the use of the public; and this he is bound to do under pain of indictment; and if he be found in default, he would, as it is expressed, be liable to be grievously amerced.

Such being the nature of the rights and obligations belonging to an ancient ferry, what is the right conferred on the Plaintiff by this Act of Parliament, and how far does it stand on the same footing as an ancient ferry?

The right conferred on the Plaintiff by the Act of Parliament differs very materially from that which exists in the case of a ferry properly so called. In the first place, the right given by the Act is extremely limited and restricted. It applies only to Sundays; and though it is perhaps possible to conceive such a thing as a Sunday ferry, giving the right to convey the inhabitants of a parish to their parish church on the other side of a river, there is nothing of the kind here. In the next place, the right conferred by the Act is a simple monopoly, without any compensation to the public, for the Plaintiff is not, according to the terms of the Act of Parliament, under any obligation to provide boats or boatmen for the convenience of the public, as the owner of an ancient ferry is bound to do; but the Plaintiff may, whenever he thinks fit, abandon *Garden Stairs*, or *Billingsgate Dock Stairs*, or any other stairs from which the right of ferry is claimed, and resume it again at his pleasure; and it is obvious that the consequences would be, that if the Plaintiff succeeds in

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putting down the Defendants' boat, he may, the week after, abandon *Garden Stairs*, and cease to keep boats at any stairs whatever, and leave the public without any means of crossing the river from *Greenwich* to the *Isle of Dogs*. It appears to me impossible to say that the right of the Plaintiff stands in any way on the same footing as an ancient ferry.

It has, indeed, been contended, that the term ferry is used in one of the sections of the Act, but it appears to me that the language of the Act is very inaccurate, and that it is impossible to conclude, from the use of that term on that one occasion, that the Act was intended to confer on the Plaintiff the right to a ferry within the proper meaning of that term, with the obligations which belong to an ancient ferry.

Now as the right conferred by the Act is in derogation of common right, without any compensation to the public, such as there is in the case of a ferry, properly so called, the Act granting the right must be construed strictly; and the Court cannot enlarge or give a wider extent to the grant than what is justified by the language of the Act. In the case of a ferry, properly so called, Courts of law and equity protect the owner of a ferry upon this principle: that the ferry, though in so far as it is a monopoly, it is a disadvantage to the public, yet, on the other hand, confers on the public the advantage of having always at hand the means of transit; and therefore it is for the public benefit that the rights of the owner of the ferry should be secured to him; but in the present case that is not so. The public have no interest in the profits of this Sunday ferry (if it may be so called) being secured to the *Watermen's Company*. It is true that those profits are dedicated to a charity; and it is for the advantage of the Company that the old and sick members should be provided for; but that is not such a public benefit as this Court, acting on the principle which applies to the case of a ferry, would protect.

There is a passage in *Blackstone's* Commentaries, in the Chapter on Nuisances (1), which appears to me to be very pertinent. He says, "If a ferry is erected on a river so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For where there is a ferry by prescription, the

(1) Vol. iii. 219.

owner is bound to keep it always in repair and readiness for the ease of all the King's subjects, otherwise he may be grievously amerced; it would be therefore extremely hard if a new ferry were suffered to share his profits, which does not also share his burthen. But where the reason ceases the law also ceases with it. Therefore it is no nuisance to erect a mill so near mine as to draw away the custom, unless the miller also intercepts the water." So that the only ground upon which the owner of an ancient ferry can claim protection is the obligation he is under to keep the ferry always in a fit state for the use of the public; and it is upon this principle alone, that the several cases which have been cited, in which the owner of the ferry has been protected, have been decided.

This being the principle, and it not applying to the present case, the Plaintiff has no right to relief, unless the Defendants are by undue and fraudulent means diverting the traffic from their plying place. But the Defendants are not doing anything of the kind here. True it is that what they are doing may have the effect of diverting the traffic from the Plaintiff's plying place, but they are only doing what they have a perfect right to do, in running their steamer from *Greenwich Pier*, which is a public pier, used by all boats indiscriminately.

The Plaintiff, therefore, not being entitled to the relief he claims, the bill must be dismissed with costs.

Solicitor for Plaintiff: Mr. *A. Jenkinson.*
Solicitors for Defendants: Messrs. *Goodman & Morley.*

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BOURSOT *v.* SAVAGE.

Trustee—Forgery—Notice—Trust, Notice of—Solicitor and Client.

A., one of three trustees, executed an assignment of leasehold property held jointly by them, to a purchaser, and forged the signatures of his two co-trustees, and also the requisite assent of the *cestui que trust* to the sale. *A.* was a solicitor, and acted as such on behalf of the purchaser:—

Held, that the circumstances attending the transaction were sufficient to affect the purchaser with notice of some trust, if not the actual nature of it; and that he had constructive notice of the trust through the knowledge of *A.*, his solicitor:

Held also, that the execution by one of the three joint tenants was a valid assignment of the legal interest in one-third to the purchaser, but that the actual and constructive notice of the trust disentitled him to the beneficial interest, and a re-conveyance ordered.

4 Ch 438
7 H L 140
20 Eq 247-8
10 Ch D 699.
700
4 Ch D 408
20 Ch D 620
21 Ch D 695

By an indenture dated the 18th of December, 1835, made between *Thomas Le Mercier* of the first part, the Plaintiff, *Emma Boursot* (then *Emma Le Mercier*) of the second part, and *G. Drysdale* and *C. Clarke* of the third part, it was declared that *G. Drysdale* and *C. Clarke*, their executors, administrators, and assigns, should stand possessed of the sum of £6,670 consols upon trust for payment of the dividends and income thereof to the Plaintiff during her life for her separate use, with a restraint on anticipation, and for the division of the trust premises after the decease of the Plaintiff among her children as she should appoint, and in default of appointment, among all the children of the Plaintiff equally; and power was given to the trustees to lay out the money in the purchase of (amongst other things) any leasehold property in *England* or *Wales* of not less than sixty years, and to re-sell such property with the consent of the Plaintiff; and it was declared that the purchaser thereof, having paid his purchase money unto, and obtained a receipt for the same from, the trustees or trustee for the time being, should be fully discharged from such purchase money.

On the 25th of April, 1840, the Plaintiff intermarried with the Defendant, *Adolphe Boursot*, and there had been issue of the marriage five children, who were Defendants to the suit. In

the year 1841 part of the trust funds were invested by the trustees in the purchase of certain leasehold hereditaments in *Islington*. In May, 1848, the Defendants, *Wm. Stone*, *Adolphe Boursot*, and *George Holmer*, were appointed trustees of the indenture of the 18th of December, 1835, in the place of the former trustees, and *George Holmer*, who was a solicitor, then became the acting trustee, and received the rents of the leasehold property, and rendered accounts of the same to the Plaintiff. Shortly before the 18th of September, 1863, the last accounts were received by the Plaintiff, and on that day *Holmer* absconded without having paid to the Plaintiff the amount then due to her, and had never since been heard of. It was then discovered that by an indenture dated the 3d of August, 1858, expressed to be made between *Stone*, *Boursot*, and *Holmer*, of the one part, and *John Savage* of the other part, the before-mentioned leasehold property at *Islington* purported to be assigned to *John Savage* for the sum of £1,270; but this indenture contained no covenants for title, except a covenant by the three parties of the first part that they had not incumbered the premises, and in this transaction *Holmer* had acted as the solicitor for the purchaser, *Savage*. The execution of the last-mentioned indenture of assignment by *Adolphe Boursot* purported to be attested by one *Robert Parks*, of *Calais*, in *France*, but *Adolphe Boursot* alleged that he had no knowledge of the existence of such person as *Robert Parks*.

The bill alleged that the signatures of *Boursot* and *Stone* to the alleged indenture of the 3d of August, 1858, were forgeries, and that the fact that they were so was known by *Holmer*. That *Boursot* and *Stone* never contracted to sell, and never authorized *Holmer* to sell, the said leasehold hereditaments to *Savage* or to any other person. That the signatures to a certain letter purporting to be an authority from *Boursot* to *Holmer* to sell the hereditaments, and the document purporting to be a consent by the Plaintiff to the sale of the premises to *Savage*, were forgeries, and at the time when the deed of August, 1858, purported to have been executed by *Boursot* at *Calais*, *Boursot* was not residing at *Calais*, but was at *Liverpool* in the ordinary course of his business; and it was also alleged that the signatures of *Boursot*

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and *Stone* to another document purporting to be an indemnity from the three trustees to *Savage* against the consequences of certain alleged breaches of covenant contained in the lease under which the premises were held were forgeries. It was charged that *Savage* had notice through *Holmer*, who acted as his solicitor, of the matters relating to the leasehold premises of which *Holmer* had notice or knowledge, and that he also had actual notice that the property was held by *Boursot*, *Stone*, and *Holmer*, as trustees.

The bill prayed that it might be declared that the indenture of the 3rd of August, 1858, was fraudulent and void, and ought to be delivered up to be cancelled, and that, if necessary, *Savage* might be ordered to assign the said leasehold hereditaments to *Stone* and *Boursot*, and to deliver up the title deeds in his possession relating to the leasehold hereditaments, and to pay to the Plaintiff the amount of rents and profits received by him from such leaseholds since the month of January, 1862.

It was admitted at the bar that the signatures of *Boursot* to the deed of August, 1858, and to the deed of indemnity, were forgeries, and that there was no such person as the witness, *R. Parks*, in existence. There was conflicting evidence as to the genuineness of *Stone's* signatures.

The Defendant, *Savage*, in his affidavit stated that at the time when he completed the purchase he expressed to *Holmer* a fear that some question might arise as to the evidence of the payment of the purchase money, but *Holmer* assured him that after the receipt endorsed on the deed, no such question could be raised; but in order to avoid any uncertainty on the subject, the Defendant (at the suggestion of *Holmer*), accompanied him to the *Union Bank*, where *Boursot* kept a banking account, and there saw the money paid into *Boursot's* account.

From further evidence it appeared that the Defendant, *Boursot*, and his partner, *Edward Urwick*, had a current account at the *Union Bank*, under the style of "*A. Boursot & Co.*," but *Boursot* had no separate account at such bank. That upon the occasion of the purchase money being paid into the *Union Bank*, as aforesaid, *Holmer* filled up the usual form of credit docket by paying the money in to the account of "*A. Boursot & Co.*" That

shortly afterwards *Holmer* called at the counting house of *A. Boursot & Co.* during the absence of *Boursot*, and informed Mr. *Edward Urwick* (*Boursot's* partner), that he had received a sum of £1270 belonging to clients of his, and not wishing to mix that sum with his own moneys, he had taken the liberty of paying it into the account of "*A. Boursot & Co.*," with the *Union Bank* of *London*, and that he would at a future time ask Mr. *Urwick* for cheques for the amount. That, accordingly, upon several subsequent occasions he called at the counting-house and obtained cheques from Mr. *Urwick* for the full amount so paid in as aforesaid.

Mr. *Osborne*, Q.C., and Mr. *E. T. Simpson*, in support of the bill, contended that upon the evidence in the suit it was clear that the signatures of *Stone* were forgeries.

If the Court should be of opinion that the signatures of *W. Stone*, as well as those of *A. Boursot*, were forgeries, the question was how far the purchaser was affected with actual notice, or constructive notice through his solicitor, of the nature of the trust. Throughout the transaction *Holmer* acted as the solicitor for *Savage*, and the knowledge which *Holmer* had respecting the property was constructive notice to *Savage*. The assignment itself was drawn in such a manner as to show that the three conveying parties were not the actual owners of the property, for it contained no covenant for title, but merely a covenant that they had not incumbered the premises. If the purchaser had employed an independent solicitor this would at once have put him upon inquiry, and the disastrous results which had now arisen would have been avoided. It was evident that Mr. *Savage* must have had some idea that there was a trust, from the fact of his refusing to pay the purchase money to *Holmer* himself. There was no reason why he should have thought the money safer in the hands of Mr. *Boursot*, if he had not known or suspected that Mr. *Boursot* was in some way beneficially interested in it. If the three conveying parties had been actual owners of the property the ordinary course would have been to pay the purchase money to *Holmer*, who would have distributed it between himself and his co-vendors.

If the Defendant had not actual knowledge of the existence

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of a trust he certainly had constructive notice through his solicitor. There was no doubt that *Holmer* acted as the solicitor for *Savage* throughout the transaction, and *Holmer* having full knowledge of the trust it must be assumed that his client had knowledge of all that was within the knowledge of his solicitor. The principle had always been acted upon of the solicitor's knowledge being the client's knowledge: *Sheldon* v. *Cox* (1), *Kennedy* v. *Green* (2), *Hewitt* v. *Loosemore* (3), *Majoribanks* v. *Hovenden* (4), *Atterbury* v. *Wallis* (5), *Cottam* v. *The Eastern Counties Railway Company* (6), *Le Neve* v. *Le Neve* (7), *Hern* v. *Nichols* (8), *Wyllie* v. *Pollen* (9).

Mr. *Jones*, for the trustees, *Boursot* and *Stone*, submitted that where one of two innocent parties must suffer for the fraud of a third person, the loss must fall upon the one who employed the guilty party, and commented upon the cases previously cited. The purchaser could not be in a better position after employing *Holmer* as his solicitor than if he had acted for himself.

Mr. *Bagshawe*, for the children of *Boursot*, urged that the fact of the indemnity having been required, was proof that *Savage* knew of the trust. The objection as to the indemnity evidently came from *Savage* himself. He must have had some suspicion of *Holmer*, and knew how to take care of himself. He was no doubt a shrewd man of business, and if he trusted too much to his own experience he must suffer for it.

As to the costs, it was submitted that *Savage* ought not to have resisted the demand when he knew, as he must have known, that a forgery had been committed. He had no right to have the forgery proved at the expense of the Plaintiff. The costs in all such cases must follow the result: *Sloman* v. *The Bank of England* (10), *Eaves* v. *Hickson* (11), *Ashby* v. *Blackwell* (12), *Hildyard* v. *South Sea Company* (13).

(1) 2 Eden, 224.
(2) 3 My. & K. 699.
(3) 9 Hare, 449.
(4) Dru. 11.
(5) 8 D. M. & G. 454.
(6) 1 J. & H. 243.
(7) 3 Atk. 646.
(8) 1 Salk. 288.
(9) 32 L. J. (Ch.) 782.
(10) 14 Sim. 475.
(11) 30 Beav. 136.
(12) 2 Eden, 299.
(13) 2 P. Wms. 77.

Mr. *Baily*, Q.C., and Mr. *Bury*, for the Defendant *Savage*, contended, that even if the Court decided that the signatures of *Stone* were forgeries, still the purchaser would be entitled to retain one-third of the estate which was effectually assigned to him by *Holmer*. A conveyance by one of three joint tenants would effect a severance of the joint tenancy, and there was a good conveyance of the legal estate in one-third to the purchaser. The case of *Cottam* v. *The Eastern Counties Railway Company* was cited, to shew that nothing passed by the deed; but the property there consisted of railway debentures, and therefore nothing short of an assignment by the three trustees would pass anything. The question really was whether another third was assigned to *Holmer* by *Stone*, and that depended upon whether the signature of *Stone* was genuine or not. If it was genuine, then the purchaser would be entitled to two-thirds of the estate. It must be assumed, after the evidence which had been adduced, that the signatures of *Boursot* were forgeries; but it was by no means so certain that the signatures of *Stone* were forged.

As to the effect of the transaction on the ground of actual notice of the trust, there was the positive denial of Mr. *Savage* that he knew of the trust. He might have entertained some suspicion of *Holmer*, and might have thought the money would not be safe in his hands alone; but that suspicion would have had the same effect upon him if he had been quite certain of the three conveying parties being the actual owners of the property, and he naturally concluded that if he paid the money into a bank, to the account of a responsible man like *Boursot*, he was doing all that could be required of him.

Then as to constructive notice through his solicitor. *Holmer* came forward in the first instance as one of the parties to sell, and it was not till the preparation of the deed of assignment that he acted in the capacity of solicitor to *Savage*. At no time did he act as solicitor to *Savage* alone, but he acted for both parties, and when the fraud commenced the connection of solicitor and client was broken off. In *Kennedy* v. *Green* there was a gross fraud perpetrated, which, as the Lord Chancellor said, was worse than an ordinary breach of trust, and it was impossible to say that the deed only raised a suspicion of fraud. Every circumstance con-

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nected with the transaction was attended with suspicion, and the deed itself was sufficient to cause any man of business to call for further inquiry. That was in all respects a much stronger case than the present. Then in *Atterbury* v. *Wallis*, the fraud consisted of not mentioning a certain deed, which was very different from the case here; and it was the same in *Sheldon* v. *Cox* and *Majoribanks* v. *Hovenden*. It was impossible for the Court to hold that the purchaser knew there was a trust, when it was quite certain that he did not. In *Ware* v. *Lord Egmont* (1) it was held, that the question as to constructive notice did not turn upon whether the party had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether not obtaining it was an act of gross and culpable negligence; and certainly the purchaser in this case had not been guilty of gross and culpable negligence. So in *Espin* v. *Pemberton* (2) it was held that the facts did not amount to culpable negligence, and, therefore, the doctrine of constructive notice did not apply. In Mr. *Lewin's* book on Trusts, p. 246, it was said, that where money is lent upon mortgage, it is desirable to keep the trust out of sight, so that when the money is paid off, the trust deed may not become an essential link in the mortgagor's title. It was well known that this practice was usually adopted, and it was considered better not to refer to the trust; and the practice of inserting a declaration that the money advanced belonged to the parties advancing it on a joint account (not alluding to them as trustees) was a matter of frequent usage.

Mr. *Osborne* in reply.

SIR R. T. KINDERSLEY, V. C., after discussing the evidence, and stating his conclusion that both *Stone's* and *Boursot's* signatures were forged by *Holmer*, continued:—

Being of that opinion, I cannot hesitate to conclude that *quoad Boursot and Stone* the deed of assignment has no operation whatever. But as *Holmer* actually executed, I think the effect of this deed of assigment was to vest the legal interest of one-third of the leasehold property in the Defendant.

(1) 4 D. M. & G. 460. (2) 4 Drew. 333.

Assuming then that the legal interest in one-third of the property passed to *Savage* by the assignment, how is it as to the beneficial interest in that one-third? Did that also pass to him by the assignment? The contention that he became entitled to the beneficial interest is founded on this proposition:—that he assumed, and had a right to assume, that these three persons, *Boursot*, *Stone*, and *Holmer*, were the beneficial owners, as well as having the legal estate; and if that was so, the consequence would follow, that the assignment by *Holmer* was not merely of the legal interest in the one-third, but of the beneficial interest also. That question depends upon this: Had he any notice, actual or constructive, that the property was held upon trust? Referring to *Savage's* own statement, I must do him the justice to say that, considering his interest in the matter, it is not an unfair statement, but that of a person wishing to speak the truth, though with that bias which his interest necessarily produced. I think it is impossible to read his evidence, in conjunction with the established facts, without coming to the conclusion that he had reason to believe or suspect, and did believe or suspect, that this property was not the property of *Boursot*, *Stone*, and *Holmer*, beneficially, but that it was subject to some trust. Of course I don't suppose that he knew what the trust was; but I think he had such an impression on his mind, that the property he was proposing to buy was trust property, as to put him upon inquiry. Moreover, I think that the evidence, including his own statement, shews he not only knew there was some trust or other, but that he supposed that the *Boursots* had some beneficial interest in the property. The mode of paying the money leads strongly to that conclusion. If *Savage* had employed his own independent solicitor, and had represented to him what was present to his own mind, it is obvious that such solicitor would have inquired into the matter, and ascertained what the real facts were. I think that *Savage* had such a degree of actual notice of the existence of a trust as to put him upon inquiry; and as he has completed the purchase without making any inquiry, he cannot maintain it against the real owners.

Supposing, however, that actual knowledge of the existence of a trust cannot be imputed to the Defendant *Savage*, still I think

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he is affected by constructive notice. He employed *Holmer* as his solicitor in the transaction of the purchase; and, according to the doctrine of Equity, a purchaser has constructive notice of that which his solicitor, in the transaction of the purchase, knows with respect to the existence of the rights which other persons have in the property. Take the simplest case: Suppose the purchaser's solicitor happens, by reason of his connection with the property, to be aware that the vendor has created an equitable mortgage. Is it possible to contend that the purchaser would not be held to be affected with constructive notice of the existence of such mortgage? It is a moot question upon what principle this doctrine rests. It has been held by some that it rests on this:—that the probability is so strong that the solicitor would tell his client what he knows himself, that it amounts to an irresistible presumption that he did tell him; and so you must presume actual knowledge on the part of the client. I confess my own impression is, that the principle on which the doctrine rests is this: that my solicitor is *alter ego*; he is myself; I stand in precisely the same position as he does in the transaction, and therefore his knowledge is my knowledge; and it would be a monstrous injustice that I should have the advantage of what he knows without the disadvantage. But whatever be the principle upon which the doctrine rests, the doctrine itself is unquestionable.

It is insisted, however, that the doctrine cannot apply to this case, because *Holmer* was committing a fraud, and the client is not to be affected with constructive notice of a fraud committed by his solicitor. But if the client would be affected with constructive notice of a trust, the existence of which is known to his solicitor, in the case where there is no fraud, the fact that the solicitor is committing a fraud in relation to that trust cannot afford any reason why the client should not be affected with constructive notice of the existence of the trust. It is the existence of the trust, and not the fraud, of which he is held to have constructive notice; and the constructive notice of the existence of the trust must be imputed to him, whether there is a fraud relating to it or not.

It appears to me, therefore, that even on the ground of actual notice, and at all events on the ground of constructive notice,

Savage cannot maintain a right to the beneficial interest even of the one-third which was assigned to him by *Holmer*.

There must be a decree for a reconveyance, according to the prayer, and *Savage* must pay the costs.

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Solicitors for the Plaintiff: Messrs. *Johnson & Jackson.*

Solicitors for the Defendant: Messrs. *Holmes, Robinson, & Stoneham.*

LEES *v.* WHITELEY.

V.-C. K. 1866 *March* 9.

Bill of Sale—Covenant to insure—Policy—Act of Bankruptcy—Order and Disposition.

The Defendants assigned certain machinery by bill of sale to secure a sum of money advanced by the Plaintiff. The deed contained a covenant to insure, but no provision for the application of the policy moneys in case of fire, in liquidation of the mortgage debt. The machinery was burnt, and the Defendants became bankrupts:—

Held, that the Plaintiff had no claim to the benefit of the policy as against the Defendants.

After the fire the Defendants executed an assignment of property to their creditors under the Bankruptcy Act, but the deed was destroyed before any of the creditors had signed it. The Plaintiff, with the knowledge of that deed, gave the insurance office notice of his claim to the policy:—

Held, that the deed of assignment was an act of bankruptcy; and that the policy being in the order and disposition of the bankrupts at the time of the notice to the insurance office, the Plaintiff on this ground also had no claim to the proceeds of the policy as against the assignees.

THIS was a suit seeking a declaration by the Court that the Plaintiff was entitled to the money payable in respect of a policy of insurance effected on certain machinery, or to so much thereof as would be sufficient to satisfy the amount due to him on the security of a bill of sale.

In 1861 the Plaintiff *Asa Lees*, supplied the Defendants Messrs. *Whiteley & Co.* with a quantity of machinery for the cotton spinning business, but *Whiteley & Co.*, not being able to pay for the same, an indenture was entered into between the members of the firm of *Whiteley & Co.* of the one part, and the Plaintiff of the

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other part, whereby *Whiteley & Co.* assigned the machinery in question in and about a mill occupied by them, to secure the repayment of £2298 (being the amount due to the Plaintiff), with interest, by instalments of £300 every three months; and it was thereby provided that if default should be made in payment of the instalments, or in performance of the covenants therein contained, the Plaintiff might enter upon the premises and sell the machinery, and out of the proceeds of such sale pay his costs and expenses, and retain so much as would satisfy the amount which might then be due under the indenture, and pay the surplus to *Whiteley & Co.* The indenture also contained a covenant by *Whiteley & Co.*, so long as any money remained due on the security thereof, to keep the premises in good repair, and during the same period to insure and keep the same insured from loss by fire in some good office, to be approved of by the Plaintiff, in the sum of £2298 at the least, and duly and regularly pay the premiums and duty in respect thereof; and in case default should be made in insuring as aforesaid, it should be lawful for the Plaintiff to insure the same machinery in the same sum, and charge the premium and duty he might pay in respect thereof, with interest, on the same machinery. This indenture was duly registered as a bill of sale.

In pursuance of this covenant Messrs. *Whiteley* insured the machinery in the *Northern Assurance Company* for £3800. The bill alleged that this was done with the Plaintiff's approval; but it appeared that the Plaintiff did not know where such policy was effected.

On the 16th of June, 1864, Messrs. *Whiteley's* mill with the machinery was destroyed by fire, and shortly afterwards the claim under the policy was agreed upon and fixed at £3175.

On the same 16th of June Messrs. *Whiteley*, on the advice of their solicitor, executed a deed of assignment of all their property for the benefit of their creditors. This deed purported to be in the form given in Schedule D to the *Bankruptcy Act*, 1861; it was executed by Messrs. *Whiteley*, and by the trustees therein named, but it was never executed by any creditors.

The landlord of the premises having threatened, after the fire, to distrain, the trustees of the deed of the 16th of June put a

bailiff in possession, and delivered the deed to him. On the following day, the 21st of June, one of the partners in Messrs. *Whiteley's* firm asked the bailiff to let him see the deed; and having thus obtained possession of it, ran away with it, but, being pursued, he dropped the deed, which was picked up by another person and destroyed.

In the following August Messrs. *Whiteley's* firm were made bankrupt, but the adjudication was founded on a totally distinct transaction.

There was conflicting evidence on the point, but the Court arrived at the conclusion on the evidence that the assignment of the 16th of June, though dated on the day when the fire occurred, was executed after the machinery had been burnt. The Court also arrived at the conclusion on the evidence that the Plaintiff had notice of the assignment of the 16th of June on the 23rd of June, and that the Plaintiff gave notice to the insurance office of his claim under his bill of sale to the insurance office on the 24th of June. This notice to the insurance office was given by the Plaintiff's solicitor to the country agent of the insurance office at *Brighouse*.

The insurance company were originally made Defendants to the bill; but they having paid the policy money into Court, the bill was dismissed as against them.

Mr. *Osborne*, Q.C., and Mr. *Taylor*, for the Plaintiff, contended that the effect of the bill of sale of the machinery was to make the moneys received from the policy available for the liquidation of the mortgage debt. The deed contained a covenant on the part of the mortgagors to keep the property insured from loss by fire; but if the mortgagor omitted to insure, or to pay the premiums, then the mortgagee was entitled to do so; and it was provided that the insurance office should be chosen by the mortgagee. What object could there be in the Plaintiff having this covenant inserted, except to entitle him to the benefit of the policy in case of fire? It was true there was no covenant to apply the policy money for restoring the mortgaged property, but natural justice required that it should be so, and there was evidently an implied contract between the parties to that effect. The case of *Garden* v.

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Ingram (1) was an authority in the Plaintiff's favour. The question there was very similar to the present, and it was decided that the mortgagor must deliver up the policy so that the money might be received by the mortgagee.

They also contended that the deed of the 16th of June, 1864, which was not executed by any of the creditors of Messrs. *Whiteley*, did not constitute an act of bankruptcy. The object of that deed was to substitute an arrangement under the Act for a bankruptcy, and the property was vested in trustees, to be applied by them in the same way that it would have been by assignees under a bankruptcy; but the deed was never executed by any of the creditors, and it was destroyed before it had been acted upon, consequently the deed was revoked, and the Defendants had not become bankrupts. They cited *Garrard* v. *Lord Lauderdale* (2), where there was a conveyance by a debtor to trustees for payment of scheduled creditors, who did not execute the deed or conform to its terms, and the Court held that it could not be enforced by the creditors who had executed it. And *In re Tresidder* (3), where the Lord Chancellor expressed an opinion that the deed, not having been executed by any of the creditors, came to nothing.

The Plaintiff in this case gave notice to the insurance office of his mortgage; and though it appeared from the evidence he was aware of the execution of the deed of assignment, he was also informed that it had been destroyed, and was not to be acted upon. He could not therefore be affected with notice of an act of bankruptcy at the time he gave notice of his claim to the insurance office: *Jones* v. *Smith* (4); *In re Styan* (5).

Mr. *De Gex*, Q.C., and Mr. *Jolliffe*, for the Defendants, contended that the policy had not been assigned by the bill of sale. If the parties had intended to mortgage the policy they could have expressed such an intention, but there was no covenant in the deed to apply the policy moneys in the restoration of the property. This case differed from others in this respect, that there was no

(1) 23 L. J. (Ch.) 478.
(2) 3 Sim. 1.
(3) Law Rep. 1 Ch. 21.
(4) 1 Hare, 43.
(5) 1 Ph. 105.

policy of insurance in existence at the time of the execution of the deed, and therefore there could be no assignment of it. The deed was merely an assignment of machinery by bill of sale, which contained a covenant to insure; but the insurance when effected extended to more than the machinery; it included the premises which contained the machinery, and these were not assigned by the deed. It was impossible to imply, from the terms of this deed, that there was any intention to make a contract that the policy moneys should be applied in liquidation of the debt. To hold this would be adding new terms to the contract which it did not contain. In *Leeds* v. *Cheetham* (1), it was held that a tenant had no equity to compel his landlord to expend money received from an insurance office on the demised premises being burnt down in repairing the premises, or to restrain the landlord from suing for the rent until the premises were rebuilt; and in *Hamilton* v. *Baldwin* (2), where a testatrix being entitled to an annuity during the life of *B.*, effected an insurance on *B.'s* life, and bequeathed the annuity to *C.*, it was held that the policy did not pass. On this point they also cited *The Saddlers Company* v. *Badcock* (3); *Simpson* v. *Scottish Union Insurance Company* (4); *Reeve* v. *Whitmore* (5).

But suppose the insurance was included in the assignment, still the Plaintiff was not entitled to any benefit from it, as the Defendants had committed an act of bankruptcy, and the policy was in their order and disposition at the time of the bankruptcy. Whether the deed of the 16th of June, 1864, was carried out or not, still the execution of it by the Messrs. *Whiteley* was an act of bankruptcy. In *Botcherby* v. *Lancaster* (6) it was held that the execution of a deed, by which a person conveyed his property to the use of some of his creditors, was a sufficient act of bankruptcy to sustain a commission, though the deed was executed by the bankrupt only, and was not proved to have been acted upon, or to have passed out of his hands. If this was an act of bankruptcy, then the Plaintiff could not claim the amount of the policy as against the assignees, for he had notice of the assignment at the

(1) 1 Sim. 146.
(2) 15 Beav. 232.
(3) 2 Atk. 554.
(4) 1 H. & M. 618.
(5) 32 L. J. (Ch.) 497.
(6) 1 Ad. & E. 77.

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time he gave notice to the insurance office. On none of these grounds could the Plaintiff support his claim. They also referred to *Hutchinson* v. *Wright* (1); *Acton* v. *Woodgate* (2); *Harland* v. *Binks* (3); *Edwards* v. *Martin* (4); and *Hayes*, Intro. to Conveyancing (5).

Mr. *Osborne*, in reply.

14 Ch D 299
18 Ch D 8

SIR R. T. KINDERSLEY, V.-C.:—

The questions raised in this case are, what is the effect of the bill of sale or mortgage executed by Messrs. *Whiteley* to the Plaintiff in respect of the policy of assurance; and assuming that the decision should be in the Plaintiff's favour on that point, whether under the circumstances, and having regard to the notice given, the money due under the policy belonged to the assignees, as having been in the order and disposition of the bankrupts at the time of the bankruptcy.

[His Honour stated the facts and proceeded]:—Upon the covenant to insure the question arises whether, the machinery having been destroyed by fire, the Plaintiff is entitled to have the money secured by the policy applied in payment of the debt due to him.

At first sight it would seem consistent with natural justice that the Plaintiff should have that right; and the question naturally occurs, why the covenant to insure should have been required by the Plaintiff if it was not intended that he should have the benefit of the insurance; and the case before Lord *St. Leonards* of *Garden* v. *Ingram* has been cited, in which a question of somewhat the same kind was decided in favour of the mortgagee; but that case differs very materially in the principle on which it was decided from the present. In that case a lease contained a covenant that the premises should be insured in the names of the lessor and lessee, and that the moneys secured by the policy should be applied in restoring the premises. The lessee mortgaged his lease, but the mortgage contained no mention of the insurance, though the lease was referred to in the recitals. The premises having been destroyed by fire, the mortgagee restored them without

(1) 25 Beav. 444.
(2) 2 My. & K. 492.
(3) 15 Q. B. 713.
(4) Law Rep. 1 Eq. 121.
(5) Vol. i. 5th ed. p. 454.

waiting to get the money due on the policy; and on a claim filed by the mortgagee, the mortgagor was decreed to deliver up the policy and join with the lessor in signing the receipt to the insurance office, to enable the mortgagee to receive the money payable under the policy.

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But the present is not the case of the mortgage of premises on which there was a policy existing at the time of the mortgage, nor is there here a covenant that the policy money shall be applied in restoring the premises; but it is merely an assignment by bill of sale of machinery, containing a covenant to insure; and it would be impossible to hold, as was done in the case of *Garden* v. *Ingram*, that the benefit of the policy passed by the assignment, as the policy at the time did not exist. It appears to me that that case does not govern the present, and that if the Plaintiff's contention can be sustained, it must stand on the footing that by reason of the covenant to insure there is an implied contract with the mortgagee that the policy moneys should be applied in liquidation of the mortgage debt.

The question then comes to this—Can I imply such a covenant from the language of the bill of sale? and on examination of the terms of that instrument I am of opinion that I cannot. Were I to do so I should be making a new contract between the parties. It was perfectly competent to the Plaintiff to have stipulated that the policy moneys should be applied in liquidation of the mortgage debt or in the restoration of the premises, but he has not done so; and how can I say that the parties intended something which is not stipulated for in this instrument, or make for the Plaintiff a better agreement than he thought it necessary to make for himself? It might be that if he had insisted on such a contract, Messrs. *Whiteley* would have refused it.

In point of fact, the existence of the insurance is obviously to some extent for the benefit of the mortgagee, although there was no obligation on the mortgagor to apply the insurance moneys in any particular way; because it is for the interest of the mortgagee that his mortgagors should be in a solvent condition, and that, in case their property should be destroyed by fire, they should still have the means of paying the mortgage debt.

I am of opinion that I cannot introduce into this contract a term

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which the parties did not think fit to introduce into it, and consequently that the Plaintiff is not entitled, by reason of the covenant, to the relief he seeks.

But supposing another view should be taken on this first question, my opinion is that on the second question also the Plaintiff must fail.

Upon the evidence I conclude that the assignment by Messrs. *Whiteley* to trustees for the benefit of their creditors, though bearing date on the same day as the fire, was executed after the fire. The effect of that deed, if it had been carried out according to the requirements of the Bankrupt Act, would not have been an act of bankruptcy—it would have been a substitute for bankruptcy sanctioned by the Act, and the trustees of the deed would have stood very much in the place of assignees in bankruptcy. But it was not so carried out. The trustees executed the deed, but it was not executed by creditors. As soon as the premises were destroyed by fire, the money secured by the policy became payable by the insurance office to Messrs. *Whiteley*; and supposing that between them and the Plaintiff the latter would have been equitably entitled to the benefit of the policy, the question arises what notice was given by him to the insurance office. At the time when the deed of assignment of the 16th of June was executed, the policy, with the money secured thereby, was in the order and disposition of the bankrupts; and if that deed was an act of bankruptcy, the policy money was in the order and disposition of the bankrupts at the time of committing the act of bankruptcy. The notice given by the plaintiff to the insurance office that he claimed the insurance money was given on the 24th of June; and it is quite clear that on the 23rd of June the Plaintiff had notice of the execution of the deed of the 16th of June. It appears to me that that deed was an act of bankruptcy. It is indeed contended that it was not so, inasmuch as, having been destroyed without having been carried out and without having been executed by any creditors, the case must stand on the same footing as *Garrard* v. *Lord Lauderdale* and cases of that class, and that the deed must be treated as revoked. It appears to me that it cannot stand on that footing; it was an actual assignment for the benefit of the creditors; and, although it was not executed by any creditors, it

does not at all follow that it is not an act of bankruptcy. It was an attempt to withdraw the property from the operation of the bankruptcy law; and the circumstance that it did not fulfil the requisitions of the Bankrupt Act does not prevent its being an act of bankruptcy. It appears to me clear from the evidence that on the 23rd of June the Plaintiff had notice of that deed. It is said that, as he was also then informed that it had been destroyed, the notice of its having been executed was not notice of an act of bankruptcy; and the case of *Jones* v. *Smith* was cited, where on the question of notice it appeared that a deed was represented as not affecting property which it did affect, and a mortgagee who, relying on such misrepresentation, had advanced his money, was held not to be affected with notice of the effect of the deed. But that does not affect this case. Here the Plaintiff had notice, not only of the execution of the deed, but also of its effect, and therefore it must be imputed to him that he had notice of an act of bankruptcy.

On both grounds the Plaintiff fails, and his bill must be dismissed, with costs.

Solicitors for the Plaintiff: Messrs *Johnson & Weatheralls*, agents for Messrs. *Redfern & Son, Oldham.*

Solicitors for the Defendants: Messrs. *Bower, Son, & Cotton.*

LAMBERT *v.* THWAITES.

Settlement—Power to appoint among Children—Implied Trust—One Child dying before Donee.

By a post-nuptial settlement, certain freehold property was conveyed to trustees upon trust to pay the rents to *W.* and his wife during their lives, and after the decease of the survivor upon trust to sell and divide the proceeds amongst all and every the children of *W.*, in such shares and proportions as he should by will appoint. There were seven children living at the date of the settlement, one of whom died before *W.*, who died without executing the appointment:—

Held, that the property was vested in all the children liable to be divested by the execution of the power; and the power not having been executed, the representatives of the deceased child were entitled to his share.

THIS case came on upon demurrer for the purpose of raising a question upon the construction of a post-nuptial settlement, dated

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the 2nd of January, 1841, by which certain freehold property was conveyed to trustees upon trust to receive the rents, and pay the same to the husband *Roger Williams*, and his wife *Jane Williams*, during their lives, and to the survivor of them in manner therein mentioned, "and from and immediately after the decease of the survivor of them, the said *Roger Williams*, and *Jane* his wife, upon trust to make sale of the said messuages, hereditaments, and premises, with their appurtenances, and divide the same amongst all and every the children of the said *Roger Williams*, lawfully begotten, or to be begotten, in such shares and proportions, manner and form, in every respect, as should be directed and declared in or by any will or codicil or codicils to such will then already or at any time or times thereafter to be duly executed by the said *Roger Williams*, and to, for, and upon no other use, trust, and intent or purpose whatsoever."

Roger Williams had issue seven children, all of whom were alive at the date of the settlement, and all attained the age of twenty-one years. *Alfred Williams*, the eldest of these children, died on the 18th of September, 1856, having made his will on the 5th of May, 1855, and thereby given and bequeathed all his real and the residue of all his personal estate to the Defendant *J. Page*, and the Plaintiff *W. J. Lambert*, their heirs, executors, and administrators respectively, upon certain trusts for the benefit of his wife and children therein mentioned, and having appointed *Page* and the Plaintiff executors thereof. *Jane Williams*, the wife of *Roger Williams*, died in October, 1856. *Roger Williams* died in the month of May, 1862, without having executed the power of appointment by will or codicil reserved to him by the indenture of the 2nd of January, 1841.

The Plaintiff submitted that, under the trusts of the said settlement, *Alfred Williams* took a vested interest in the hereditaments comprised therein and the proceeds of the sale, and that he was entitled to an equal seventh part thereof, and that such interest was now vested in the Plaintiff and the Defendant *John Page*; all the Defendants except *John Page* insisted that the death of *Alfred Williams* in the lifetime of *Roger Williams* prevented his taking any interest in the hereditaments. The Defendant *Page*, by reason of his being a trustee of the settlement as well as executor under

the will of *Alfred Williams*, took no part in the contest between the Plaintiff and the other Defendants.

The bill prayed a declaration that *Alfred Williams* took a vested interest in the hereditaments comprised in the settlement of the 2nd of January, 1841, and that the trusts of the indenture might be carried into effect.

Mr. *Glasse*, Q.C., and Mr. *Lewin*, in support of the demurrer, contended that only those children of the settlor who survived him were entitled to take shares in the property in default of appointment. The trusts were for the benefit of the husband and wife for their lives, and after the death of the survivor for all the children in such shares as *Roger Williams* should direct by his will only, consequently he had no power to appoint by deed among the children who were living, and could only appoint to the children who survived him. The rule was that only those objects of the power could take by implication who might have taken under the appointment; and as *Roger Williams* could not by will have appointed a share to *Alfred*, who was dead, his representatives could not take in default of appointment. The donee of the power had a duty to perform, which was to divide the property between the children by his will, and if the donee failed in performing that duty, the Court would exercise the power vicariously for the donee. If the donee had executed the power by appointing in favour of the deceased child, his appointed share would have lapsed. How then could the Court do more than the donee of the power could have done? The Court could only go to the extent of the power, and could only give to those to whom the donee might have given.

This question, however, was concluded by authority. In the case of *Walsh* v. *Wallinger* (1) Sir *John Leach* held, that where there was a power to be exercised by will only, then in default of appointment those parties alone could take who were alive at the decease of the donee of the power; and in *Woodcock* v. *Renneck* (2) there was a gift to the children subject to a power to be exercised by the surviving parent; and the Master of the Rolls decided that the objects of the power were children living at the death of the

(1) 2 Russ. & My. 78. (2) 4 Beav. 190.

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survivor of the parents. They also referred to *Brown* v. *Pocock* (1), *Casterton* v. *Sutherland* (2), and *Bonser* v. *Kinnear* (3), and submitted that, as in the present case, the power was to be exercised by will only, it differed from those cases where the appointment might have been made by deed: *Sugden* on Powers (4); *Lewin* on Trusts (5).

Mr. *Baily*, Q.C., and Mr. *Ellis*, for the Plaintiff, contended that the limitation in favour of all the children of *Roger Williams*, in such shares as he should by will appoint, created a trust in default of appointment in favour of all the children, whether they survived or not. The words were most explicit, and it would be doing violence to them to say that they meant only such children as should survive the donee of the power. All the children were living when this settlement was executed, and it was a trust for them all, which would open and let in after-born children. It was not a simple power, but a trust with a power to divide. If the power had been executed, the division might have been in favour of the surviving children only, but in default of appointment all the objects of the power would take. If all the children of *Roger Williams* had died in his lifetime, then, according to the construction contended for by the Defendants, the trusts would have failed entirely. This evidently was not the intention, and would not be the case if the Plaintiff's contention were adopted.

They commented upon the cases cited, and contended that these authorities were in the Plaintiff's favour. They also cited *Brown* v. *Higgs* (6); *In re Theed's Settlement* (7); *Roper* on Legacies (8); *Lewin* on Trusts (9); *Grieveson* v. *Kirsopp* (10).

Mr. *Glasse*, in reply, submitted that the observation in *Roper* on Legacies was not borne out by the authorities there cited, and referred to *Malim* v. *Keighley* (11) and *Malim* v. *Barker* (12).

(1) 6 Sim. 257.
(2) 9 Ves. 445.
(3) 2 Giff. 195.
(4) 8th ed. p. 595.
(5) 3rd ed. p. 704.
(6) 4 Ves. 708.
(7) 3 K. & J. 375.
(8) 4th ed. p. 629.
(9) 4th ed. p. 542.
(10) 2 Keen, 653.
(11) 2 Ves. 333.
(12) 3 Ves. 150.

March 8. Sir R. T. Kindersley, V.C., after referring to the settlement and the facts of the case, continued:—

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The question is whether, in default of execution of the power, the property is to be divided amongst the six children who survived the father, excluding *Alfred*, or among the seven, including him.

In order to determine this question it is necessary to bear in mind what has now become an elementary principle in the doctrine of powers, although at one time it was disputed, and indeed held the other way—I mean the principle that the existence of a power of appointment does not prevent the vesting of the property until, and in default of, execution of the power. The exercise of the power will divest the estate; but until the power is exercised, it remains vested in those who are to take in default of appointment. That is now perfectly well settled, and has been so ever since the well-known case of *Doe* v. *Martin* (1) in 1790. But where the instrument contains no express gift over in default of appointment, the difficulty is to determine who are to take in default of appointment. The general principle seems to be this: If the instrument itself gives the property to a class, but gives a power to *A.* to appoint in what shares and in what manner the members of that class shall take, the property vests, until the power is exercised, in all the members of the class, and they will all take in default of appointment; but if the instrument does not contain a gift of the property to any class, but only a power to *A.* to give it, as he may think fit, among the members of that class, those only can take in default of appointment who might have taken under an exercise of the power. In that case the Court implies an intention to give the property in default of appointment to those only to whom the donee of the power might give it.

I will first refer to the case of *Walsh* v. *Wallinger* (2). There a testator bequeathed the residue of his estate to his wife for her own use and benefit (so far it was an absolute gift to her). Then he added, "trusting that she will, at her decease, give and bequeath the same to our children in such manner as she shall appoint." In that case there is no gift in express terms to the children by

(1) 4 T. R. 39. (2) 2 Russ. & My. 78.

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the testator, nor is there any direction that they are to take in default of appointment; and therefore it can only be inferred from the power itself who are to take in default of appointment; and inasmuch as the power is only to be exercised by will, and therefore can only be exercised in favour of those children who shall be living at the wife's death, we are obliged to conclude that the intention of the testator was that those only who survived the wife should take in default of appointment. And so it was decided.

I will next refer to the case of *Kennedy* v. *Kingston* (1). That was a bequest of £500 to *Ann Rawlings* for life, and at her decease to divide it in portions, as she should choose, among her children. She had four children, one of whom died; and then, when three were surviving, she made a will, giving the fund in certain proportions to those three. Afterwards one of those three died before her, so that only two survived her. It was held that the appointment to the three was perfectly good, and that the lapsed share would go to the two who survived; and for this reason: there was no direct gift by the testator to the children; the fund was given to her for her life, with a power at her decease to divide it as she liked among her children. That she could only do by her will; and of course none but those who survived her could take under her will; and therefore those only who survived her must be presumed to have been intended by the original testator to take in default of appointment.

Now I will refer to the case of *Casterton* v. *Sutherland* (2). That was a devise to the testator's wife for her life, and after her decease "unto and amongst all and every our children, in such manner and in such proportions as my said wife shall, either in her lifetime or by her last will, appoint." This case materially differs from the two former in this respect—that we have here in express terms a direct gift by the testator to the children; the gift is, after the decease of his wife, "unto and amongst all and every our children," and the power to the wife is to appoint the manner and proportions in which they should take. There were five children, and they all died before the wife, and there was no execution of the power. Sir *William Grant* decided that it was a tenancy in common among all the children in fifths, subject to the

(1) 2 Jac. & W. 431. (2) 9 Ves. 445.

power of appointment. It is true that we have in this case an element which did not occur in the other cases, namely, that the power might have been exercised by deed or instrument in writing *inter vivos* as well as by will; and therefore it may be said that the Court would imply a gift to all the children, in default of appointment, from that circumstance alone, since all might have taken under an exercise of the power. That case is therefore not a decisive authority on the question.

There is another case of *Brown* v. *Pocock* (1), decided by the Vice-Chancellor of England. It was in effect a bequest to *A.* of £2 a week for life, with a direction that a sum should be set apart to answer those weekly payments; and after the death of *A.* there was power to *A.* to leave the sum to and for the benefit of his wife and children, in such manner as he should by will give and bequeath the same. There were four children of *A.* living at the death of the testatrix, of whom one died; and two others were born afterwards. The wife died before her husband *A.*, the donee of the power. There was no valid appointment under the power, and the question was, to whom was the fund to go in default of appointment. Now here, it will be observed, there was no direct gift in terms by the testatrix to the wife and children, and only a power to *A.* to appoint by will, and yet it was held that the wife and children took in default of appointment as joint tenants, and therefore the surviving children were entitled to the fund. This case seems at first sight at variance with *Kennedy* v. *Kingston* (2); but the decision was evidently founded upon this circumstance, that the power was to be exercised, not merely for the benefit of an indefinite class of children, but also for the benefit of the wife, a living and defined individual, who was an object of the testatrix's bounty; and therefore it stood upon the same footing as if there had been a direct gift by the testatrix to the wife and children in such manner as *A.* should by will appoint; and so it was a vested interest in the wife and children, subject to being divested by the execution of the power.

In the case now before the Court there is in express terms a direct gift to the children; and the power is only to appoint the shares and proportions, manner and form, in which they are to

(1) 6 Sim. 257. (2) 2 Jac. & W. 431.

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take; and it seems to me impossible to express in more definite, strong, and precise terms the intention of *Roger Williams*, the settlor, that every one of his children should take, subject only to the exercise of the power by will. No doubt, in the event of any of the children predeceasing him, he might have exercised the power in favour of the survivors, and it would have been perfectly good; because it is to be exercised by will only, and a will can only be made in favour of persons who survive the testator. But that does not prevent the property from vesting in the meantime in all the children, liable to be divested by the exercise of the power; and remaining so vested in default of execution of the power.

There are two cases to which I ought to refer, which were both decided by Lord *Langdale*, and which were cited by counsel in the course of the argument. One of them is *Woodcock* v. *Renneck* (1). That was a bequest of £1700 stock in trust to pay the dividends to *A.* and his wife *B.* for their lives and the life of the survivor of them, and after their decease upon trust to transfer and pay over the stock to their children in such shares and proportions as the survivor of *A.* and *B.* should by will appoint. So here was a direct gift by the testator to the children of *A.*, subject to a power which was to be exercised by will by the survivor of *A.* and his wife. The husband was the survivor; there were three children, but only one of them survived the husband. Then the husband made his will, and appointed the whole to that one child. Lord *Langdale* decided that that was a good appointment; and it is impossible to question the propriety of that decision. The power was to appoint by will, and could only therefore be exercised in favour of such of the children as should survive *A.*, and there was only one surviving. But the Master of the Rolls very unnecessarily thought fit to consider the question, who would have taken in default of appointment; and having regard to the language being "their children," which, he said, although it *prima facie* means all children, still is a flexible term, and might mean the children living at the death; and having regard to the fact that the power was to be exercised by will, and to the words of the trust being "to transfer and pay over," he concluded, upon the whole, that in default of appointment the surviving child alone would have taken.

(1) 4 Beav. 190.

I am bound to say that I should not have come to that conclusion myself; but, at all events, it was no more than an expression of opinion that the words "their children" may, from the context, be held to mean the children living at the death of the parent. But that does not touch the present case, where there is nothing to admit the construction that the children to whom the property is given are only those who should survive the parent; because we have here not only the words "all and every the children," which would be quite sufficient, but the words are, "all and every the children now lawfully begotten or to be begotten." It appears to me impossible to attribute any other intention to the settlor than to give the property to all the children then living, and to all who might come into existence afterwards, subject only to his power to control and vary their interests by his will.

The other case decided by the same learned judge is *Winn* v. *Fenwick* (1), where on marriage a fund was settled in trust for the husband for his life, and after his death, in case the wife survived him, in trust for her absolutely. But *in case the wife should die in her husband's lifetime, leaving one or more child or children then living*, then after the husband's death upon trust for all and every the child or children of the marriage, in such parts, shares, and proportions as the wife should by deed or will appoint; and *if there should be no issue of the marriage living at her decease*, then upon trust for such persons (generally) as she should by deed or will appoint, and, in default of such appointment, in trust for the husband. So that there was no gift to any child or children at all, except in the event of the wife dying in the lifetime of her husband, and leaving one or more child or children living at her death. And it will be observed that the power was to appoint by deed *inter vivos* as well as by will. The wife did not exercise her power. She died in her husband's lifetime, and she had children, some of whom died in her lifetime and some survived her. The Master of the Rolls decided that those children only who survived the wife were entitled to the fund; but he came to that conclusion solely on the ground that the power to appoint was only to arise in the event of her dying before the husband, and leaving one or more child or children living at her death, taken in connection

(1) 11 Beav. 438.

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with the clause by which the property was to go to the husband in the event of there being no issue of the marriage living at her death. Whether his Lordship's decision in that case can be regarded as satisfactory may well be doubted. It certainly appears not to have been satisfactory to Lord *St. Leonards*, who observes upon that case—"It may be considered doubtful whether this construction gave effect to all the words of the settlement which the Court intended to construe by implication." But whether the decision of the Master of the Rolls was sound or not, as it proceeded entirely on grounds which do not exist in the case now before the Court, it can have no effect on the decision of this case.

I am of opinion that all the children, including *Alfred*, took the property in equal shares in default of appointment, and that therefore the demurrer must be overruled.

Solicitor for the Plaintiff: Mr. *C. Armstrong.*
Solicitor for the Defendants: Mr. *Chapple.*

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CLEGG *v.* ROWLAND.

Power to lease Mines—Open and unopened Mines.

A lease of land (without mentioning mines) will entitle the lessee to work open but not unopened mines. If there be open mines, a lease of land with the mines therein, will not extend to unopened mines; but if there be no open mines, a lease of land together with all mines therein, will enable the lessee to open new mines.

Where there was a conveyance to trustees of land, together with the mines thereunder, and a power to grant leases for fourteen years without mentioning mines:—

Held, that the trustees had no power to grant leases of unopened mines.

BY a settlement made upon the marriage of *Brierly Rowland* and *Charlotte Rowland*, then *Charlotte Clegg*, and dated the 22nd of May, 1833, *Charlotte Rowland* conveyed to *J. Whittaker* and *J. Fallowfield*, their heirs and assigns, among other hereditaments, one undivided moiety of certain messuages or dwelling-houses, cottages, closes, fields, pieces or parcels of land and hereditaments,

in *Oldham*, devised to the said *Charlotte Rowland* by the will of her father; and also of and in certain yearly chief rents issuing out of the said hereditaments, together with the mines, minerals, and quarries thereunder, and the appurtenances thereto belonging, to hold the same upon trust to pay the rent and proceeds thereof to *Charlotte Rowland* during the joint lives of herself and *Brierly Rowland*, but not by way of anticipation, for her separate use, and after the death of either of them, then to the survivor for life, and after the death of the survivor, then upon certain limitations for the benefit of children, and in default of children, then the property was to be in trust for and to be conveyed and paid to such person or persons for such estate and estates as *Charlotte Rowland* should by will appoint, and in default of appointment, upon certain trusts therein expressed. The settlement contained a power of leasing in the following words: "Provided always, and it is hereby further declared and agreed, that it shall be lawful for the trustees at any time or times whilst this moiety shall remain vested in them under the trusts of these presents, and during the joint lives of *Brierly Rowland* and *Charlotte* his wife, with their joint consent and approbation in writing, and after the decease of either of them, then with the consent and approbation of such survivor, to demise and lease all or any part of the said moiety of the said hereditaments, lands, and other premises, granted, released, and assigned for any term or number of years not exceeding fourteen years in possession, but not in reversion or by way of future interest, so as upon every such demise or lease there be reserved and made payable during the continuance thereof respectively, to be incident to and go along with the reversion expectant on the same, the best and most improved yearly rent or rents that can be reasonably had or gotten for the same, without any sum or sums of money being taken by way of fines in respect of such demises or leases, and so as none of the said demises or leases be made dispunishable of waste by any express words therein, and so as in every such demise or lease there be a clause of re-entry on non-payment of the rent or rents to be thereby reserved." The settlement contained no express power of granting mining leases.

On the 1st of September, 1834, being about a year and a half after the marriage, a lease was made between *Brierly Rowland* and

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Charlotte Rowland of the first part, the trustees of the settlement of the second part, *Mary Anne Clegg* (the sister of *Charlotte Rowland*, and the owner of the other undivided moiety of all the premises) of the third part, *Humphrey Nicholls* of the fourth part, and *James Stopherd* and *Thomas Brideoake* (the lessees) of the fifth part. By that lease two mines of coal, known as the *Higher* and *Lower Bent Mines*, and also a mine known as the *Black Mine*, lying under certain parts of the premises comprised in the above settlement, were demised by the trustees with the privity and approbation of *Brierly Rowland* and his wife, and by *Mary Anne Clegg*, to *J. Stopherd* and *T. Brideoake* for ten years, subject to a fixed or tie-rent of £100 per annum, and certain royalties therein specified, and with various reservations not necessary to be specified.

Of the mines comprised in the lease, the *Higher* and *Lower Bent Mine* had never been worked. The *Black Mine* had been worked, but the working had been abandoned for some time, and it was now an open mine.

One moiety of the rents and royalties reserved by the lease were received from time to time by *Brierly Rowland* under a belief that he was entitled to them, and he applied them to his own use. This went on till his death. There were no children of the marriage. The wife survived, and she made a will by which she appointed the premises to persons who were now represented by the Plaintiffs.

The bill was filed against the legal personal representatives of *Brierly Rowland*, and also against *John Rowland* the elder, who was a substituted trustee under the settlement three years and a half after the date of the lease, and it prayed that it might be declared that *Brierly Rowland* was, at the time of his death, liable to account to the trustees for the time being of the settlement for the various sums received by him in respect of such mining lease, and that his estate was now liable to account for and pay to the Plaintiffs, as the executors and trustees of the will of *Charlotte Rowland*, the said principal sums, together with interest thereon from the time they were received; and the bill prayed that the Defendant, *John Rowland* the elder, as the surviving trustee of the settlement, might be declared liable for and ordered to pay to the Plaintiffs

such of the several principal sums as were received by *Brierly* *Rowland* with the privity of the Defendant *John Rowland*.

To this bill the Defendants demurred.

Mr. *Baily*, Q.C., Mr. *Glasse*, Q.C., and Mr. *Jolliffe*, for the demurrer, contended that the power contained in the settlement of May, 1833, enabled the trustees to grant leases of unopened as well as open mines. The parcels in the deed comprised the words, "mines, minerals, and quarries," which were therefore conveyed to the trustees, and the subsequent power to lease must necessarily have included all that was passed by the parcels. There could be no reason why the trustees should not have this power given them, as it was evidently for the benefit of the property that the mines should be worked. One of the mines was actually opened at the time, and it could not be said that there was no power to grant a lease of that mine. Must it not, therefore, have been the intention of the parties that all mines should be worked? It made no difference that there was a clause in the power "that none of the demises or leases should be made dispunishable of waste;" for in the case of *Daly* v. *Beckett* (1), where similar words were to be found, the Master of the Rolls held that these words must be rejected, since they could not apply to an existing open mine, which was comprised in the lease in that case as in this.

They also cited *Morris* v. *The Rhydydefed Colliery Company* (2), and *Campbell* v. *Leach* (3).

Mr. *Osborne*, Q.C., and Mr. *Karslake*, in support of the bill, submitted that this was no more than the ordinary power to grant leases at rack rent, and was similar to most of the forms used for that purpose. It never could be contended that such a power would confer the right to grant leases of unopened mines. It was true that the parcels, after describing the property, contained this addition, "together with the mines, minerals, and quarries thereunder," but there was no mention of the word mines in the power to grant leases. The ordinary power to grant mining leases was very different in every respect, and such a form would have been introduced if mining leases had been intended.

(1) 24 Beav. 114. (2) 3 H. & N. 473, 885. (3) Amb. 740.

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They referred to *Bainbridge* on Mines, *Davidson's* Forms, *Rogers* on Mines, and *Davidson's* Conveyancing Forms; to shew what was the usual clause giving power to grant mining leases.

In the case of *Pearse* v. *Baron* (1), where it was stipulated that a settlement should be executed, which was to contain a power of leasing for twenty-one years, "and all such other powers, provisoes, clauses, covenants, and agreements, as are usually inserted in settlements;" it was held that these words would not authorize the introduction of a power of granting building leases for longer terms. The case of *Daly* v. *Beckett* was certainly not like the present, or it would probably have been decided in the Plaintiff's favour. Sir *Edward Sugden*, in his book on Powers (2), in speaking of *Campbell* v. *Leach* said: "The Master of the Rolls held that the unopened mines could not be demised, as that would be an *authority* to commit waste, and the power expressed that no authority was to be given to commit waste." If any owner in fee had granted such a lease as this, it would not have enabled the lessee to open mines; therefore, *a fortiori*, a power to grant leases would not comprise a power to grant such a lease.

They also referred to *Whitfield* v. *Bewit* (3), and *Platt* on Leases (4).

As to the demurrer by *John Rowland*, it was necessary that he should be made a party to the suit, since the *cestui que trust* could not file a bill on the subject of the trust without making the existing trustee a co-Plaintiff or Defendant, but nothing was prayed against him, further than as to the receipt of rents by *Brierley Rowland*, with the privity of *John Rowland*.

SIR R. T. KINDERSLEY, V.C., after stating the facts of the case, continued:—

In considering the question, what was the effect of the power contained in the settlement, this principle must be borne in mind, that if there be open mines and unopened mines on the same land, belonging to an owner in fee, if the owner grants a lease of that land, whether the mines be expressly included in the lease or not, the lessee may work the opened mines, but he is not justified

(1) 1 Jac. 158.
(2) Vol. ii. p. 328. 7th ed.
(3) 2 P. Wms. 240.
(4) Vol. i. p. 21.

in opening an unopened mine. That is laid down by Lord *Coke* very explicitly (1). He says: "A man hath land in which there is a mine of coals, or of the like, and maketh a lease of the land (without mentioning any mines) for life or for years; the lessee for such mines as were open at the time of the lease made, may dig and take the profits thereof. But he cannot dig for any new mine that was not open at the time of the lease made, for that would be adjudged waste. And if there be open mines and the owner make a lease of the land, with the mines therein, this shall extend to the open mines only, and not to any hidden mine. But if there be no open mine and the lease is made of the land together with all mines therein, there the lessee may dig for mines and enjoy the benefit thereof; otherwise those words should be void."

The ground of the law thus clearly laid down by Lord *Coke* must of course be, that where there are an open mine and an unopened mine, unless the lease contains an express authority to work the unopened mine, it must be assumed to have been the intention of the parties that the lessee should not open the unopened mine. That is very clear. It is true that in the present case the question is, not what is the construction of a lease, but what is to be the construction of the power to grant leases? But if it be a sound doctrine that a lease by an owner in fee of the land and the mines, there being an open and an unopened mine, does not justify the lessee in opening the unopened mine, then it appears to me that a power to make a lease of the land and mines (even mentioning mines) ought to be construed only to authorize the granting of a lease, so as to entitle the lessee to work the open mines, and not to entitle him to work the unopened mines. That, I think, is a legitimate and reasonable, I might almost say a necessary, corollary from the proposition of law laid down by Lord *Coke*. It will be observed that that view proceeds on the supposition that in the power not only the lands and hereditaments, but mines, were specifically mentioned. But in the present case the power does not specifically mention mines at all. It is true that mines and minerals are mentioned in the description of the property conveyed, and the power mentions the hereditaments, lands, and other premises before conveyed, which words are

(1) Co. Litt. 54, *b*.

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large enough to comprise the mines. But the power is in form the ordinary leasing power to enable the granting of leases of land for fourteen years; and not only are there none of the usual provisions applicable to leases of mines, but there is the express provision that none of the demises or leases be made dispunishable of waste. This is not very accurate language, but of course it must mean that the lessees are not to be dispunishable for waste. And it is justly said by the Plaintiffs, that the opening of an unopened mine is in itself waste. And no doubt opening an unopened mine by a tenant for life, or lessee, who has no special authority to open it, is waste as between him and the remainderman or reversioner. If he had such authority, it might be questioned whether his doing so would be properly termed waste; but that is perhaps rather a question of words than of substance. In the case before the Master of the Rolls, where he interpreted the power to be an express power to grant leases to work unopened as well as opened mines, there followed the clause that the lessee was not to be made dispunishable of waste. It might, perhaps, have been suggested, that the meaning of the clause prohibiting waste was, that the lessee was to be restricted to the customary and workmanlike mode of working the mines, whether already opened or not, so as not to injure the mine for future working, or prejudice the reversioner. But that would be a forced construction of the clause. It is no doubt waste for a lessee to open an unopened mine. The Master of the Rolls looked at it in that point of view. He considered that the terms of the prohibition were such as to prevent the lessee from committing waste—that is, from opening an unopened mine; and being of opinion that the terms of the power were such as expressly to authorize the working of unopened mines, he came to the conclusion that there was so much contradiction in the clause which imported a prohibition against waste that he rejected the clause altogether. That case is a strong authority for this proposition—that such a clause is inconsistent with a power to work unopened mines; and, therefore, the existence of that clause in the present case appears to me to afford a strong argument for holding that this power was not intended to authorize the granting of a lease of any unopened mines.

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I am of opinion that this lease was invalid so far as it authorized the opening of a new mine, and that, therefore, the demurrer of the representatives of *Brierly Rowland* must be overruled.

The other demurrer is by *John Rowland* the elder, who became a trustee two or three years after the granting of the lease, and it is contended that he ought himself to have received the rents and accumulated them. It is insisted that his acquiescence has made him liable. I do not see any ground for that. There is, in fact, nothing to shew that he knew anything of the lease. It was done by *Brierly Rowland* and the then trustees. *Brierly Rowland* went on receiving the rents, and it does not appear that the trustees ever received any of them. There is no ground for holding that *John Rowland* is liable for want of diligence in the execution of the trusts, and, therefore, his demurrer must be allowed.

Solicitors for the Plaintiffs: Messrs. *N. C. & C. Milne.*

Solicitors for the Defendants: Messrs. *Bower, Son, & Cotton.*

In re PORTSMOUTH BANKING COMPANY.

V.-C. K. 1866 *Feb.* 19.

HELBY'S, STOKES', AND HORSEY'S CASES.

Joint-stock Company—Winding-up — Contributory—Transfer — Liability for Losses prior to Transfer—Statute of Limitations—Specialty, Liability of Shareholder whether.

A deed of settlement, establishing a banking company, contained a clause exonerating the transferror of shares from all liabilities in respect of his shares subsequently to the transfer; with a proviso that nothing contained in such clause should extend to release the transferror from his proportion of losses sustained by the company up to the time of transfer.

There was also a clause providing that the directors should present a balance sheet and general summary of accounts for every half year, and also such further statement or report of the condition of the company as they should deem expedient, and every such balance-sheet or summary of accounts should be binding on the shareholders.

The directors never presented any balance-sheet or summary of accounts, but they produced a report half-yearly, in which the affairs of the company were mis-stated. A winding-up order was obtained:—

Held, that the transferrors of shares were liable for the losses which accrued

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prior to their transfers; and that the shareholders were not bound by the directors' reports.

One transfer of shares took place twenty-three years, a second nine years, and a third five years, before the winding-up:—

Held, that the liabilities were specialty debts, and that the *Statute of Limitations* applied only in the case of the first transfer.

THE *Portsmouth, Portsea, and Gosport Banking Company*, was established in the year 1839, and by a deed of settlement, dated the 5th of April in that year, it was stipulated by the 26th clause: "That whenever, by any means whatsoever, any shares shall have become actually forfeited, or shall be duly and effectually transferred to a new holder, then and in such case, and not before, the responsibility of the previous holder as a member of the company in respect of such shares shall (so far as the law will in that behalf allow) cease and determine, and such previous holder shall be exonerated and released from all subsequent claims, demands, obligations, and liabilities, in respect of the same shares, and from all future observance and performance of the covenants, conditions, stipulations, and agreements, in the deed of settlement contained in respect of the same shares: Provided, nevertheless, that nothing in this clause contained shall extend, or be construed to extend, to release the previous holder of shares so forfeited or transferred as aforesaid from his proportion of the losses (if any) sustained by the company up to the period of his ceasing to be such holder as aforesaid."

And by the 37th clause it was provided: "that each shareholder shall be entitled to and interested in the profits, and be subject and liable to the losses of the company, in proportion to his shares."

And by the 48th clause it was provided: "that at every general meeting in February and August, the directors shall present a balance-sheet or general summary of the accounts of the company for the half year respectively ending on the 30th day of June, or the 31st day of December next preceding such general meeting, and such further statement or report of the then present condition and probable future progress of the affairs of the company, as the directors shall deem expedient or proper for the interest of the company to be made public; and every such balance-sheet or

general summary of accounts shall be binding and conclusive on all the shareholders, their executors, administrators, and assigns, at law and in equity, unless some error shall be discovered therein and made known in writing to the directors before the next general meeting, and in that case such error, so notified, shall be rectified."

An order had been obtained for the winding-up of the above company, and the case now came on, upon an adjourned summons, for the purpose of settling certain classes of shareholders upon the list of contributories. One of these classes was represented by *William Helby*, to whom five shares in the company were allotted on the 1st of October, 1839; the dividends had been received by him upon these shares up to August, 1859, when he ceased to hold such shares, by transferring them to *Joseph Blake* previously to February, 1860. Another class of shareholders was represented by *Edward Stokes*, to whom twenty-five shares were allotted on the 1st of October, 1839, and he received dividends thereon till February, 1856, and his shares were then taken by the company, in pursuance of the provisions of the deed of settlement, on the 22nd of May, 1856, and he therefore ceased to be a shareholder in the company. The third class of shareholders was represented by *Samuel Horsey*, to whom five shares in the company were allotted on the 1st of October, 1839, and dividends thereon were paid to him from that date up to February, 1842, and he then ceased to hold such shares, by transferring the same to *D. Price* on the 6th of April, 1842.

The transfer of shares in all cases was effected by a deed, in which it was expressed that the transferree should hold the shares to him, his executors, administrators, and assigns, subject to the same rules, orders, restrictions, and regulations, and on the same conditions, as the transferror had held the same immediately before the execution thereof, and such transfers were executed by two of the directors of the company for the purpose of testifying their approval of the transfer.

By an affidavit made by an accountant employed to investigate the affairs of the company, and to ascertain the true state of their accounts, it appeared that the company had sustained losses in the year 1840, and had continuously sustained losses from that

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period down to the stoppage of the bank on the 31st day of March, 1865, and that such losses, in that time, amounted to the sum of £80,000. It was also stated that no balance-sheets had ever been submitted to the shareholders of the company, but the directors had produced to the shareholders, at the general meetings, reports, in some of which they stated that the company was in a very flourishing condition, and that not only were they in a condition to set by a large reserve fund, but also to pay a dividend of £10 per cent. to the shareholders.

Mr. *De Gex*, Q.C., and Mr. *Horton Smith*, for the Official Liquidator, contended that these shareholders were liable, under the deed of settlement, for all the losses sustained by the company up to the transfer of their shares, notwithstanding that they had ceased to be shareholders.

It was expressly provided by the 26th clause of the deed, that nothing therein contained should be construed to extend to release the previous holders of shares, either forfeited or transferred, from their proportion of the losses sustained by the company up to the period of their ceasing to be such holders. The effect, therefore, was, that the transferror was liable for previous losses, but the transferree was not liable for any losses incurred before his period of becoming a shareholder. Whatever general principle there might be with regard to the transfer of shares in ordinary joint-stock companies, there were express words here to take the case out of such general principles.

There were some cases where the transferrors were held not to be liable, and transferrees were liable, but in every case the question depended upon the wording of the deed of settlement. In ordinary partnerships, and in the absence of any express provision, the transferrors of a share in the partnership would not escape from the liability for any losses which accrued prior to his transfer: *Wood* v. *Braddick* (1): and so it must be in a joint stock company, in the absence of any provision to the contrary. *Sanderson's Case* (2) was an express authority in support of this construction. When the case was heard before the Vice-Chancellor (*Knight Bruce*) Mr. *Sanderson* was held not liable, but his Honour

(1) 1 Taunt. 104. (2) 3 De G. & Sm. 66.

was not aware at the time of the form of the deed of transfer used in that company. In subsequently deciding *Dodgson's Case* (1), which arose upon the winding-up of the same company, it was discovered that the company's deeds of transfer were in a form precisely corresponding with the deed in this case, and the Vice-Chancellor (*Knight Bruce*) said that if the deed of transfer in *Sanderson's Case* was in the same form, that circumstance had not been brought to the attention of the Court, and that if it had, the decision might have been different. This intimation led to an appeal, in *Sanderson's Case* (2), to the Lord Chancellor, who, however, dismissed it, on the ground that the *Winding-up Act* of 1849 operated retrospectively and precluded an appeal after twenty-one days. On the case being brought before the House of Lords (3) the appeal was not resisted. *Holmes' Case* (4) was also an authority upon the construction and effect of the same deed of settlement, entirely in favour of the official manager, although it happened that in that case there had been annual statements of account, which were made by the deed of settlement conclusive, and according to which no loss had been sustained. But Lord *St. Leonards* expressly laid it down that, if the official manager could have said that a loss had been sustained, the deed would have undoubtedly bound the transferror to bear his proportion of it. Here there had been no such statement of account. Whatever inconvenience, therefore, there might be in a company going on with such a provision as this, still the Court must give effect to it. This disposed of *Helby's* case, in which the transfer was made less than six years before the winding-up.

As regarded the other two cases, it was contended that the *Statute of Limitations* applied. But that depended upon the date when the liability arose, and it was submitted that the date of the winding-up order must be taken to be the period at which the liability of each transferror to make good past losses arose. To the world, the existing shareholders and transferrors within three years were alone liable, according to 7 Geo. 4, c. 46; but under the deed, the transferrors were bound to indemnify the existing shareholders, a liability moreover which did not arise until the latter had suffered a loss. This did not happen before

(1) 3 De G. & Sm. 85.
(2) 1 Mac. & G. 306.
(3) 3 H. L. C. 698.
(4) 2 D. M. & G. 113.

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the winding-up order was made, the existing shareholders having received dividends on the footing of there having been no loss, but large gains. If it was said that that was a hardship on the transferrors, the answer was, that it might and ought to have been obviated by the transferrors insisting upon the proper statement of accounts which the deed made conclusive, and by so doing it would have prevented any such complaint as was pointed out by Lord *St. Leonards* in *Holmes' Case*. But supposing the *Statute of Limitations* could be applied to such a case, still it could only affect Mr. *Horsey*. In the case of Mr. *Helby*, the transfer of shares was made in 1859; that is, within six years of the winding-up, and consequently there could be no question of his liability. In *Stokes'* case the transfer took place nine years before the winding-up, but as this was a liability by way of specialty, there would be no bar of the statute in less than twenty years. In *Horsey's* case the transfer was in 1842, and this consequently was the only case of the three in which the statute, if applicable at all, could be set up.

[They also referred to *Dering* v. *The Earl of Winchelsea* (1); *Ex parte Harding, In re Williams* (2); and *Robinson's Executors' Case* (3).]

Mr. *Glasse*, Q.C., and Mr. *Druce*, on behalf of the proposed contributories, submitted that the transferrors of shares could not be held liable for past losses, except under the peculiar wording of this 26th clause in this deed of settlement; and that was intended to apply only as between the transferror and transferree, and not as between the transferror and the general body of shareholders, and therefore there could be no liability on the part of the transferrors to be placed on the list of contributories under the winding-up of the company. It was moreover impossible to carry out this clause unless the other provisions were adhered to with reference to furnishing a balance-sheet every half-year. If a transferror was to be liable for past losses, those losses must be ascertained, and this could only be done by means of the half-yearly balance-sheet; but in this company no such balance-sheet

(1) 1 Cox, 318.
(2) 33 L. J. (Bky.) 26. (Reversed on App. Law Rep. 1 H. L. 9.)
(3) 6 D. M. & G. 572.

was ever prepared. That appeared from the affidavit of the accountant. It was therefore impossible to fix the amount of loss at any particular period when a transfer should take place, and consequently the 26th clause could not be carried out. The general rule in all joint stock companies was, that the transferror of shares could not be put upon the list of contributories after his transfer: *Sutton's Case* (1); *Mayhew's Case* (2).

As to the *Statute of Limitations*, there could be no doubt that the liability accrued on the accrual of the loss. If there was a loss, then the right of action accrued, and the statute would run from that period. The case of *Helby* being within six years could not be affected by the statute, but *Stokes'* case, in which the transfer was effected nine years before the winding-up, would be affected by the statute. It was a simple contract liability, and was barred at the expiration of six years: *Robinson's Executors' Case* (3). About the third case, that of *Horsey*, there could be no question, since the transfer was effected more than twenty years before the winding-up: *Tatam* v. *Williams* (4).

Mr. *De Gex*, in reply.

SIR R. T. KINDERSLEY, V.C.:—

With respect to the case of Mr. *Helby*, the question is, whether Mr. *Helby*, having more than five years previously to the winding-up transferred his shares to another person, is liable to be put upon the list of contributories, not for the purpose of being made liable to all the losses which may have been incurred by this bank, but as liable in respect of that portion of the losses which had occurred previously to the date of the transfer. And first, what is the effect of the 26th clause of the deed? This bank was established a great many years ago, and it contains that most unfortunate clause, which was then more commonly contained in deeds of settlement than is the case now—a clause purporting to make the transferror of shares still liable in respect of losses accrued prior to the time of the transfer. Assuming the effect of the clause to be that which is contended for by the official liquidator, the result really comes to this, that it

(1) 3 D. G. & Sm. 262.
(2) 5 D. M. & G. 837.
(3) 6 D. M. & G. 572.
(4) 3 Hare, 347.

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would be utterly impossible to provide machinery by which it could be ascertained what each individual is liable for in respect of the losses accrued during his holding of shares, without making out a balance-sheet and ascertaining the exact condition of the company on every day on which any individual shareholder made a transfer of shares. But still there is the clause, and it must be construed according to the fair interpretation of the terms used. If the clause had stopped before the last proviso, I should have considered that the proper interpretation was, that the transferror of shares was to be exonerated from all liability, not only in respect of losses that might accrue subsequently to the transfer, but even in respect of those which had accrued prior to the transfer. It is perhaps somewhat ambiguous even without what follows; but still it appears to me that the proper conclusion would be, that the intention was an absolute and unqualified exoneration from liability for all loss, both past and future. But it appears to me that that interpretation is precluded by what immediately follows: "Provided that nothing in this clause contained shall extend, or be construed to extend, to release the previous holder of shares so forfeited or transferred as aforesaid from his proportion of the losses, if any, sustained by the company up to the period of his ceasing to be such holder as aforesaid." It appears to me impossible to avoid the conclusion that, whatever ambiguity might have existed from the prior part of the clause, the latter part of the clause precludes the possibility of attributing that meaning to it; and I must hold that the effect is, notwithstanding the absurdity and inconvenience resulting from the interpretation of it, that it was intended that the transferror should still, not merely as between him and the transferree, but as between him and the rest of the shareholders, remain liable for any loss that had accrued up to the time at which the transfer took place.

This clause, with the most trifling exception, is the same *verbatim et literatim* as that which occurred in the case of *Holmes, In the Matter of the North of England Bank*, before Lord *St. Leonards*, and also as that which occurred in the two cases of *Sanderson* and *Dodgson*, before the Lord Justice *Knight Bruce*, when Vice-Chancellor. In *Holmes' Case* Lord *St. Leonards* considered the effect of the clause to be, to leave the transferror still liable for

losses which had accrued prior to the time of the transfer; and the view of Lord Justice *Knight Bruce* in the other two cases was, that the transferree was liable only for that portion of the losses which accrued subsequently to the time at which he took the transfer of the shares. I must attribute the same effect to this clause in the present case. The effect is, that Mr. *Helby* would remain liable for any loss that accrued prior to the date of his transfer.

What, then, is the effect of that clause in the deed which provides that there shall be half-yearly meetings, at which there shall be produced by the directors a balance-sheet or summary of the accounts of the company for the preceding half-year, accompanied by such report or reports as the directors may think fit to add with respect to the condition and prospects of the company? It is imperative upon the directors to produce the balance-sheet or summary of accounts, and it is optional with them to add to that such report as they may think proper. Now, as is so common with these joint stock companies, it appears that the directors never in any single year produced any such balance-sheet or summary of accounts of the concern as the deed required. What they did was merely to make a report to the half-yearly meeting, representing that considerable profit had been made, so much so as to enable them not only to set apart a reserve fund, but also to declare a dividend of 10 per cent. among the shareholders. It is contended that such report ought to be considered as a substitute for the balance-sheet or summary of accounts which the directors were required to produce, and ought to be binding upon all the shareholders. It appears to me that I cannot attribute that effect to such a report. It is the balance-sheet or summary of accounts, and not the report, which by the terms of the deed is to be binding on the shareholders. A balance-sheet or summary of accounts would shew on the one hand all the assets, and on the other hand all the liabilities of the company; and it was only from that sort of statement that any safe conclusion could be drawn as to the question whether there had been profit for the half-year or not, and whether any and what dividend should be declared. No such balance-sheet having been ever produced, there is nothing which can be binding on the shareholders.

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The result is, that Mr. *Helby* must be put upon the list of contributories, but with a limited liability; and it must be so expressed as to render him liable only for his share of such loss, if any, as accrued during the time he held his shares.

The next case, that of Mr. *Stokes*, stands precisely on the same footing as that of Mr. *Helby*, except so far as he can avail himself of the *Statute of Limitations*. Mr. *Helby* made his transfer within six years prior to the time of winding-up, whereas Mr. *Stokes's* transfer was made nine years before the winding-up; and he insists that as more than six years have elapsed since the transfer, the *Statute of Limitations* is a bar to all liability to any loss that may have been incurred prior to the transfer. On the part of the official liquidator it is contended, on the authority of the case of *Ex parte Harding*, that no *Statute of Limitations* can apply in such a case, because the liability does not accrue until it is ascertained that a loss has occurred previously to the transfer; and that until that is ascertained, the liability will continue, whatever number of years may have elapsed since the transfer. But I am of opinion that if any loss occurred prior to the transfer, the liability of the shareholder in respect of that loss accrued at the time when he transferred his shares, and that the liability existed at that time, although the amount of the liability may not have been ascertained till long afterwards.

The official liquidator further contends, that if any *Statute of Limitations* is applicable to this case, it is not the statute of *James* but that of *William IV.* That, of course, depends upon the question whether the liability is a liability by way of simple contract or by way of specialty. It appears to me that it is a liability by way of specialty, because the clause of the deed which constitutes the contract among the shareholders is an agreement under seal. The statute of *James*, therefore, does not apply to this case but the statute of *William IV.* And as twenty years have not elapsed since the transfer, the statute is no bar to the liability. Mr. *Stokes* must, therefore, be placed on the list in the same manner as Mr. *Helby*.

With regard to Mr. *Horsey*, inasmuch as his transfer took place twenty-three years before the winding-up, he is entitled to the

benefit of the statute, and he ought not to be put upon the list of contributories. V.-C. K. 1866 HELBY'S, STOKES', AND HORSEY'S CASES.

Solicitors for the Official Liquidator: Messrs. *Tilleard, Son, Godden, & Holme.*

Solicitors for the Defendants: Messrs. *Sole, Turners, & Hardwick.*

LEWIS *v.* MATHEWS.

V.-C. K. 1866 *April* 30.

Will—Trust Estate, devise of—"Sole Use"—Separate Estate.

A testator being seised of trust estate, by his will, after reciting that he was or might at the time of his death be seised, or possessed, or entitled to real and personal estate, devised all and singular his said real and personal estate to *H.*, her heirs, executors, administrators, and assigns, for her and their own sole and absolute use and benefit. *H.* was a feme sole:—

Held, that the devise to *H.* included the trust estates, and that the words did not create a separate estate.

WILLIAM LEWIS by his will, executed in *New South Wales*, and dated in September, 1861, after recitals that he was, or at the time of his death, or previously thereto, might be, seised, or possessed, or entitled to real and personal estate, property and effects, reversions and remainders, both in that colony, *Great Britain*, and elsewhere; as respected all and singular such his property, estate, and effects, he expressed his earnest desire that two friends (naming them) would kindly undertake the office and duties of executors and trustees of and under that his will. The testator then directed his personal estate to be collected and converted into money, and authorized his executors and trustees to wind-up his affairs, and settle and compromise any matter in dispute relating to his estate, and directed his debts and funeral and testamentary expenses to be paid as soon as possible; and, after making certain specific legacies, he left, bequeathed, and devised, subject to the bequests and directions contained in his said will, "all and singular my said real and personal estate whatsoever and wheresoever, including moneys in any bank or elsewhere, to my dearest friend and companion *Hannah Walker*, her heirs, executors, administrators, and assigns (according to the

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nature of the property), for her and their own sole and absolute use and benefit."

The testator died in September, 1862.

The testator, at the time of his decease, was seised of certain real estates, which were vested in him as trustee under the will of *James Lewis;* and a suit having been instituted for the administration of *James Lewis's* estate, the question arose whether the trust estates so vested in *William Lewis* passed by his will, and to whom.

Hannah Walker subsequently married *Richard Sampson Mathews*, and in August, 1864, letters of administration with the will of *William Lewis* annexed were granted to her.

The Plaintiff and the Defendant both contended that the trust estates passed to *Hannah Walker*, and the cause had been set down as a short cause; but the Vice-Chancellor desired that the authorities on the point might be considered; and the case stood over for that purpose.

Mr. *W. R. Ellis*, for the Plaintiff, the administrator of *James Lewis*, under whose will the trust estates vested in the testator, *William Lewis*:—

The trust estates did not pass to the trustees and executors named in the will, there being a direction for the payment of debts which would be inapplicable to trust estates, though otherwise the language would have been large enough to pass them: *Trent* v. *Trent* (1); *Gillard* v. *Gillard* (2); *Ex parte Brettell* (3); *Lord Braybroke* v. *Inskip* (4): where *Ex parte Brettell* explained (5).

The language of the gift to *Hannah Walker*, if the word "sole" had been omitted, would have been sufficient to pass the trust estate to her: *Bainbridge* v. *Lord Ashburton* (6), where the words "own use and benefit" were used, followed by *Sharpe* v. *Sharpe* (7), in which the same words were used, and *Ex parte Shaw* (8), where the words used were "own absolute use and benefit."

With regard to the use of the word "sole" in *Lindsell* v.

(1) 1 Dow. 102.
(2) 5 B. & A. 785.
(3) 6 Ves. 577.
(4) 8 Ves. 417.
(5) 8 Ves. 434.
(6) 2 Y. & C. Ex. 347.
(7) 12 Jur. 598.
(8) 8 Sim. 159.

Thacker (1), the Vice-Chancellor *Shadwell* said "sole" use was equivalent to "separate" use, but in *Gilbert* v. *Lewis* (2), in which case *Lindsell* v. *Thacker* was cited, it was held that "sole use and benefit" did not in a will create a separate estate.

The only way in which the testator could make *Hannah Walker* trustee of such trust estates in case of her marrying, so as to prevent the husband becoming trustee by virtue of his marital right, would be by making the devise to her to her separate use, and the testator may have intended to do so in this case.

[He also referred to *In re Morley's Will* (3); *Taylor* v. *Meads* (4).]

Mr. *W. Pearson* for the Defendants, Mr. and Mrs. *Mathews*:—

There being a trust for payment of debts, the trust estates cannot pass to the trustees, and the only question is, whether they passed to *Hannah Walker*, or are undisposed of. The words "use and benefit" are used in the same way as the word "use" under the *Statute of Uses*. In a settlement, having regard to the status of the parties, the word "sole use" would mean "separate use," but not so in a will; and the word "sole" here means nothing more than absolute.

[Mr. *Shapter*, Q.C., *amicus curiæ*, referred to *Green* v. *Britten* (5).]

Green v. *Britten* does not touch the present case, the gift there being of personalty, and to trustees to invest in trust for her sole benefit during her life.

Mr. *Ellis*, in reply.

Sir R. T. Kindersley, V.C.:—

In construing this will the Court must endeavour to ascertain the intention of the testator, although the probability is that the question as to the trust property never occurred to his mind.

It is quite clear that the words in the recital in this will are sufficient to comprise not only the estates in which the testator was beneficially interested, but also the estates he held as trustee. The power to pay debts and settle disputes given by

(1) 12 Sim. 178. (2) 1 D. J. & S. 38. (3) 10 Hare, 293.
(4) 13 W. R. 394. (5) 1 D. J. & S. 649.

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him to his executors does not, I think, affect the question. There is no devise of the real estate to those trustees. The testator gives all his real and personal estate to *Hannah Walker*. Surely that must mean all the real and personal estate which he had mentioned in the recital that he then was or might be seised of or entitled to—*primâ facie* that would pass the trust estate.

If the question were *res integra*, I should have been disposed to think that upon this will there was a sufficient indication of intention to make a beneficial devise to *Hannah Walker* to have prevented the trust estate being comprised in it, but the authorities are too strong the other way; and upon those authorities I should feel constrained to hold that the trust estate passed by the devise, unless the circumstance that the devise is to *Hannah Walker* for her sole use and benefit is sufficient to warrant a different conclusion.

What then is the effect of the devise being to *Hannah Walker*, her heirs, executors, administrators, and assigns, for ever, "for her and their own sole and absolute use for ever?" Does the word "*sole*" import that the devise is to her *separate* use?

There seem to have been different opinions on the point. In *Lindsell* v. *Thacker*, the Vice-Chancellor of *England* held that a devise to testator's wife for her sole use for ever necessarily implied separate use. In *Gilbert* v. *Lewis*, Lord *Westbury* held that a devise to testator's wife for her sole use and benefit did not give her an estate to her separate use. In *Green* v. *Britten*, the Lords Justices were of opinion that a bequest of personalty to a married woman, with a direction that it should be invested as the executors should think proper in trust for her sole benefit during her lifetime, was a gift to her separate use. The point, however, appears not to have been contested.

But in the present case the word "sole" is not confined to the lady herself, but is applied equally to her heirs, executors, administrators, and assigns, to whom it could not have been intended to give a separate estate; and that appears to me conclusively to shew that the testator did not mean by the use of that word to give to *Hannah Walker* the property for her separate use, but only to give her the absolute interest; and

that it is used very much in the same sense as the word "absolute."

I may observe that I think there is some weight in the argument that even if it were proper to decide that *Hannah Walker* was intended to have the property to her separate use, it would not necessarily follow therefrom that the trust property must be excluded from the devise; for the testator might have intended to give her the trust property to her separate use, in order that if she married, her husband might not interfere with it in his marital right. But it is unnecessary to resort to that argument.

I think I am bound to decide that there was no separate estate created in *Hannah Walker*, and that the devise to her does include the trust estate.

Solicitors for the Plaintiff: Messrs. *Depree & Austen.*
Solicitors for Defendants: Messrs. *Stevens & King.*

M. R.

1866

Feb. 11, 12, 13; *April* 23.

SHATTOCK *v.* SHATTOCK.

Married Woman—Separate Estate—Power—Appointment by Will—Liability of appointed Property to Debts.

Property settled to the separate use of a married woman for life with a power to appoint the reversion by deed or will, which she exercises by will, is not liable after her death to the payment of her debts.

Semble, the separate property of a married woman is not liable after her death to her general engagements.

Semble, in the administration of the separate estate of a married woman after her death, her debts should be paid in order of priority.

Observations on *Johnson v. Gallagher* (1).

By the settlement made upon the marriage of *William Rowcliffe* and *Elizabeth Shattock* in October, 1807, real and personal estate was conveyed and assigned to *John Shattock* and *Robert Beadon*, their heirs, executors, administrators and assigns, upon trust, after the solemnization of the marriage, for the sole and separate use of *Elizabeth Shattock* for her life exclusively of her husband, and from and after her decease upon trust for the children of the marriage, and in default of children, upon trust for such person or persons, for such estates and interests, upon such conditions, and with such restrictions, and in such manner and form, as *Elizabeth Shattock*, notwithstanding her coverture, should by deed or will appoint, and in default of such appointment, as to the real estate, upon trust for *Elizabeth Shattock*, her heirs and assigns, and as to the personal estate, upon trust for such persons as would be her next of kin under the *Statute of Distributions* in case she had died sole and unmarried.

In February, 1808, Mrs. *Rowcliffe*, by deed, appointed to her husband after her death a life estate in the settled real estate, and an annuity of £150 a-year out of the income of the settled personal estate, and, in August, 1808, they agreed to live apart and executed a separation deed. In August, 1820, Mrs. *Rowcliffe*, by deed, appointed £600 of the settled property to *John Shattock*. In November, 1822, she duly executed her last will, and thereby

(1) 30 L. J. (Ch.) 298.

appointed the remainder of her property in the manner therein specified, and appointed *Stephen Bridge* and *Joseph Yates* executors of her will. In March, 1823, she died without having altered her will, leaving her husband surviving her, and without having had any child of the marriage. Administration with the will annexed was granted to *Stephen Bridge*, *William Rowcliffe* having refused to consent to the grant of probate.

In 1824, a suit of *Bridge* v. *Rowcliffe* was instituted to administer the trusts of Mrs. *Rowcliffe's* will and execute the trusts of the settlement. The settled personal estate, consisting of £2,440 consols, was transferred into Court, and the income was ordered to be paid to *William Rowcliffe* during his life, in part payment of his annuity. *William Rowcliffe* died in January, 1864.

The bill in this cause was filed in December, 1864, by one of the persons interested under the testamentary appointment, praying, by way of supplement to the former suit, for the execution of the trusts of the settlement, and of the will of *Elizabeth Rowcliffe*, so far as they remained unperformed, and for the administration of the estate of *Elizabeth Rowcliffe*. *Stephen Bridge*, by his answer, claimed to be paid out of the fund in Court the sum of £14 15*s*., with interest, due to him by virtue of a promissory note signed and given to him, in November, 1822, by Mrs. *Rowcliffe* when living apart from her husband, which debt he submitted he should have been entitled to retain if the property had not been transferred into Court.

The cause now came on upon motion for decree, and the only question was, whether *Bridge's* debt was payable out of the settled property.

Mr. *Jessel*, Q.C., and Mr. *F. H. Colt*, for the Defendant *Bridge*:—

It will be admitted that the written engagements of a married woman are binding upon her separate property after her death. And this is not because such engagements operate by way of appointment, but because Courts of Equity, having conferred upon the married woman the exclusive right of disposing of the property, attach to that property the liability to satisfy her contracts, which by reason of her personal incapacity to contract, would be nugatory if they could not be so satisfied: *Owens* v. *Dicken-*

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son (1). This liability attaches to property which the married woman has power to appoint by deed or will, and which she appoints by will, just as much as to property settled for her separate use. The right of disposition *inter vivos* is the same in both cases, and is in both cases the creation of equity, at least as regards personal estate. In *Johnson* v. *Gallagher* (2) Lord Justice *Turner* considered it to be settled, that where a married woman has a life estate with a power of appointment by deed or writing, or by will, the *corpus* of the property is subject to her debts, and that proposition is clearly established by *Heatley* v. *Thomas* (3) and the other cases to which he refers. In *Vaughan* v. *Vanderstegen* (4), which was followed in *Hobday* v. *Peters* (5) and *Blatchford* v. *Woolley* (6), the power was exercisable by will only.

Mr. *Southgate*, Q.C., and Mr. *Langley*, for the Plaintiff :—

The contracts of a married woman do not affect her separate property, unless it can be inferred that the parties intended that they should affect such property. In a note to *Roper* on Husband and Wife (7), Mr. *Jacob* says: "The subsequent authorities seem to have narrowed the liability to this extent, confining it to cases where the contract is entered into with an intention (either real or presumed) of affecting the separate estate, and holding it to be specifically liable on the ground of that intention." In the case of property settled to the separate use of a married woman, so that she can dispose of it in any manner that she pleases, the Court infers from her written contracts an intention to charge the property, but no such inference is possible where she can only dispose of the property by deed or will. The *dictum* of Lord Justice *Turner* in *Johnson* v. *Gallagher* (2) is not borne out by the authorities; in *Allen* v. *Papworth* (8), the only question was as to the profits of an estate which the married woman had power to receive for her separate use, and to appoint as she pleased; in *Hulme* v. *Tenant* (9),

(1) Cr. & P. 48.
(2) 30 L. J. (Ch.) 298.
(3) 15 Ves. 596.
(4) 2 Drew. 165, 363.
(5) 28 Beav. 354.
(6) 2 Dr. & Sm. 204.
(7) Vol. ii. pp. 241, 243.
(8) 1 Ves. Sen. 163; Belt's Sup. 88.
(9) 1 Bro. C. C. 16.

the decree only affected the rents, which were settled to the separate use of the married woman; in *Heatley* v. *Thomas* (1), the judgment is not reported, but the observations of Sir *W. Grant* in *Lee* v. *Muggeridge* (2), shew that he construed the settlement in the former case as giving the married woman the power of disposing of the property in any manner, so that it was in effect settled to her separate use, and that case is so understood by Lord *St. Leonards* (3). *Vaughan* v. *Vanderstegen* (4) decides that a married woman's testamentary appointment does not make the appointed property liable to her debts, and, though in that case the power could only be exercised by will, the Vice-Chancellor expressly repudiated any distinction between that case and the case of a power exercisable by deed or will, his decision being founded on the distinction between power and property. In the present case the power could only affect the reversion after the death of the married woman, and she could not, by exercising the power, make that reversion her separate property. *Vaughan* v. *Vanderstegen* (4) having been followed in *Hobday* v. *Peters* (5), and *Blatchford* v. *Woolley* (6), the *dictum* in *Hughes* v. *Wells* (7) may be considered to have been overruled. In the last edition of his work on Powers (8), Lord *St. Leonards* states the doctrine laid down in *Vaughan* v. *Vanderstegen* (4) without comment, but dissents from the *dicta* in *Johnson* v. *Gallagher* (9).

Mr. *E. K. Karslake*, Mr. *Freeman*, Mr. *Martineau*, and Mr. *B. B. Rogers*, for the other Defendants, took no part in the argument.

Mr. *Jessel*, in reply:—

The observations of Sir *W. Grant* in *Heatley* v. *Thomas* (1), distinguishing that case from *Sockett* v. *Wray* (10), shew that he considered the power of disposition *inter vivos* to be the only thing necessary in order to create the liability to the engagements of a married woman. In *Allen* v. *Papworth* (11) it appears, from the

(1) 15 Ves. 596.
(2) 1 V. & B. 118.
(3) Powers, 8th Ed. p. 311, *n.* i.
(4) 2 Drew. 165, 363.
(5) 28 Beav. 354.
(6) 2 Dr. & Sm. 204.
(7) 9 Hare, 749.
(8) 8th Ed. pp. 474, 476.
(9) 30 L. J. (Ch.) 298.
(10) 4 Bro. C. C. 483.
(11) 1 Ves. Sen. 163; Belt's Sup. 88.

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report in *Belt's* Supplement, that the married woman had a power over the reversion; in *Hulme* v. *Tenant* (1) Lord *Thurlow* held the leasehold estate, which was subject to the married woman's power of appointment, liable to her bond; in *Owens* v. *Dickenson* (2) there was only a power *quoad* the corpus of the estate. All these cases, therefore, support the *dictum* in *Johnson* v *Gallagher* (3). The reasoning in *Vaughan* v. *Vanderstegen* (4), and *Blatchford* v. *Woolley* (5), is founded upon the proposition that in giving effect to a married woman's power of appointment equity follows the law, but such powers are as much the creation of equity as trusts for separate use, although in the case of real estate the *Statute of Uses* has given them a legal effect.

April 23. LORD ROMILLY, M.R.:—

The question raised in this case is one of considerable importance. It is this: whether an estate which is limited for the separate use of a married woman for her life, with a power to her to appoint it either by deed or will, is liable, after her death, when she has exercised the power by her will, to be applied in payment of the general debts incurred by her.

The law on this subject is, in some degree, anomalous. It lays down that a married woman cannot bind herself by contract, but that she may, by contract, bind her separate estate. The question here, however, is solely as to the extent to which this estate is bound, after the decease of the married woman. It is, therefore, unnecessary to consider here any question as to the liability of her separate estate during her life.

So treating this subject, it will be proper to consider it, first, where the married woman has an absolute interest in the property settled to her separate use; and, secondly, where she has only a limited interest, with a power of disposing of the rest of the property after her death. In the former case, the law now, as administered by the Courts of Equity, seems to be settled to this extent, that her separate property will be liable to pay any debts of hers which she has

(1) 1 Bro. C. C. 16. (2) Cr. & P. 48. (3) 30 L. J. (Ch.) 298
(4) 2 Drew. 363. (5) 2 Dr. & Sm. 204.

secured by any writing, the Courts holding that giving such a writing as a security for the debt must have a meaning, and that unless the meaning be to charge her separate estate, there is no meaning whatever in the writing, which is a mere piece of waste paper. Equity has also held that it is sufficient, if it be shown that the married woman verbally promised that her debts should be paid out of her separate estate. All these cases rest on contract, either expressed or implied; but whether contract is necessary, whether the separate estate of the married woman would, after her death, be liable to pay the debts due to her general creditors, who could not allege that she had entered into any contract with them on the subject, is a matter of much importance. It has a direct bearing on this case, and it is one on which the decisions are conflicting.

The second case, where property is settled upon a married woman for life, with a power of disposing of it, may be considered under three heads. First, where the married woman has the power of disposing of the property by deed only; secondly, where she has the power of disposing of it by deed or will; and, thirdly, where she has the power of disposing of it by will only. Each of these is, of course, divisible into two sub-divisions—the case when she has, and when she has not, executed the power.

The first is very simple. If she has executed the power by deed, the appointment takes effect according to the deed; and if she has not executed the power, the property goes as in default of appointment. In the second, where the married woman has power to dispose of the property by deed or will, and does not execute the power, it is also quite clear that her creditors can take nothing, and the property goes as in default of appointment. Her execution of the power by deed during her lifetime takes effect, of course, according to the terms of the appointment; but her execution of the power by will, when she has the power to dispose of it by deed or will, raises the question now before me; that is, whether the fact of executing the power of appointment lets in her general creditors to require payment out of that property, although they are not directly appointees of the property, that is, where they cannot claim it under the words of the will. Of course, in the case of a man, the property so appointed would become assets for the payment of his general creditors; that is decided in *Jenney* v.

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Andrews (1), and many other cases. But whether in the case of a married woman, the appointment lets in her general creditors to be paid out of it, appears to me to depend on exactly the same principle as whether the separate property, to which a married woman was entitled absolutely, becomes after her death assets applicable to the payment of her debts generally. And this appears to me to depend on the answer to be given to this question, namely, whether the doctrine of the Courts of Equity on this subject is, that where a married woman has separate estate she stands in the same position as if she were a *feme sole* generally. In other words, whether any contract she enters into is a binding contract, provided it can be satisfied out of her separate estate, though not entered into with knowledge of or upon the faith of such separate estate, or, on the other hand, whether the capacity of a married woman having separate estate to act as a *feme sole* is confined to the property itself, and to acts done by her in respect of, and in regard to, the property itself. The difference is most material, and the cases on this subject are not easily to be reconciled in all respects. After giving the matter the best consideration I can, and reading over all the cases I can find on the subject, I have come to the conclusion, that the only mode of reconciling the greater part of the authorities with each other (for some are not to be reconciled), and, what is still more important, of reconciling them with the fundamental principles regarding married women, is to answer in the affirmative the second branch of the question I have stated; that is, to hold that separate property is not, after the death of the married woman, liable to pay her general debts, either in the case of her having been absolutely entitled to the property, or of her having had only a life estate with a power to dispose of it by deed or will, and having executed that power by will.

The principle of the Courts of Equity relating to this subject, in my opinion is, that, as regards her separate estate, a married woman is a *feme sole* and can act as such; but only so far as is consistent with the other principle, namely, that a married woman cannot enter into a contract. These principles are reconciled in this way. Equity attaches to the separate estate of the

(1) 6 Madd. 264.

married woman a quality incidental to that property, viz., a capacity of being disposed of by her; in other words, it gives her a power of dealing with that property as she may think fit; but the power of disposition is confined to that property, and the property must be the subject matter that she deals with; and, therefore, if she makes a contract, the contract is nothing unless it has reference, directly or indirectly, to that property. This is, in my opinion, the extent of the doctrine of equity relating to the separate estate of a married woman. It is on this principle that every bond, promissory note, and promise to pay, given by a married woman, has, for the reason I have already stated, been held to be a charge made by her on her separate estate; that is to say, it is a disposal of so much of her property, the whole of which, if she pleased, she might give away. But if equity goes beyond this, it appears to me that it is laying down this principle, that where a married woman has separate estate she may bind herself by contract exactly as if a *feme sole;* or, in other words, that the possession of separate property takes away the distinction between a *feme covert* and a *feme sole,* and makes them equally able to contract debts.

It is clear that this implication of a charge cannot exist in the mere case of simple contract debts without one word said or written to shew that the separate property is to be bound. It is proper that I should point out, in order to explain my meaning more clearly, which I am anxious to do before going further into the discussion of the authorities, the manner in which the case before me must be governed by the conclusion to be come to in the case where the liability of the separate property of a married woman, in which she had an absolute interest, to pay her general debts is determined. If in that case (that is, where the married woman had the absolute interest) she had given a promissory note, it would have been a charge on her separate property for the reasons I have already stated; because, as she had the absolute interest in it, she had power to charge her separate property after her death in any manner she pleased, and she might do so by promissory note; but when she is entitled for life only, and can only charge the property after her death by deed or will, the promissory note being neither a deed nor a will, has no effect in charging the property after her

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death. During her life it would be a charge upon her life estate, because she could so bind her life estate, but when the life estate has no longer any existence, the note constitutes no charge upon the property at all.

After a careful examination of the authorities on this subject, I do not think that I should have hesitated so long in the conclusion to which I have come, had it not been for the very learned and elaborate judgment of Lord Justice *Turner* in the case of *Johnson* v. *Gallagher* (1), in which he came to an opposite conclusion. Upon reading that judgment, it appears to me that he was of opinion that the leading case on the subject was *Hulme* v. *Tenant* (2), and that that case lays down the proposition broadly in favour of his view. That case, as reported in *Brown*, came twice before the Court, and is so reported as to give a foundation for either view. As I considered the case originally it appeared to me that the principle laid down by Lord *Thurlow* was, that a *feme covert* can act, with respect to her separate property, as a *feme sole*, but if, without reference to her separate property, she enters into an engagement which would bind a *feme sole*, this has no effect on her or on her property. Lord Justice *Turner*, in his judgment in *Johnson* v. *Gallagher* (1), considered that Lord *Thurlow* distinctly laid down the opposite doctrine, namely, that the separate estates of married women are liable for their general engagements. When I refer to the report itself, I find that on the first occasion Lord *Thurlow* uses these words: "The rule laid down in *Peacock* v. *Monk*, that a *feme covert* acting with respect to her separate property is competent to act in all respects as if she was a *feme sole*, is the proper rule, and necessary to support the decisions on this subject.' A little further down, he expressly says, with reference to her separate property: "I take it, therefore, it is impossible to say but that a *feme covert* is competent to act as a *feme sole* with respect to her separate property where settled to her separate use; but the question here goes a little beyond that; it is not only how far she may act upon her separate property, I have no doubt about that; but the question is how far her general personal engagement shall be executed out of her separate property. If she had by instrument contracted that this or that portion of her sepa-

(1) 30 L. J. (Ch.) 298. (2) 1 Bro. C. C. 16.

rate estate should be disposed of in this or that way, I think she and her trustees might have been decreed to make that disposition; but if she enters into an engagement which would make a *feme sole* liable to the whole extent of the contract as to her person, &c., in every respect, it is clear such a general engagement entered into by a *feme covert* will not bind her as such." Then, a little further on, he says: "I know of no case where the general engagement of the wife has been carried to the extent of decreeing that the trustees of her real estate shall make conveyance of that real estate, and by sale, mortgage, or otherwise, raise the money to satisfy that general engagement on the part of the wife." Up to this point it is clear that Lord *Thurlow* considered that the wife could only deal to the extent of her separate estate. It is to be remembered that in that case she was entitled to the property for life, with power to dispose of it by deed or will after her death. On the second occasion, the reporter, Mr. *Brown*, was not present. He reports it *ex relatione*, and very shortly; and, so reported, it does state the proposition as noticed by Lord Justice *Turner*, but I doubt whether both are reconcilable. It is proper to observe that the reporter says he can trust to the accuracy of the friend who gave him the note. The Lord Chancellor begins in this way: "I have no doubt about this principle, that if a Court of Equity says a *feme covert* may have a separate estate the Court will bind her to the whole extent as to making that estate liable to her own engagements, as for instance, for payment of debts, &c." There the proposition is stated broadly in favour of the view which Lord Justice *Turner* takes; but this is certainly, as it appears to me, irreconcilable with the observations which Lord *Thurlow* made on the former occasion. Then it is proper to observe what the decree is. The decree is not to the effect of the judgment stated in the second part of the report, for the decree merely affects the rents of the wife's separate estate, which were settled for her separate use without any restraint upon anticipation; and as the wife had joined in one bond with her husband, and had herself given the other bond, it was clear that she thereby intended to bind her separate estate, and that she did bind it to the extent of her power. Therefore, Lord *Thurlow's* decree was clearly right on the facts, without resorting

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to the doctrine that the general debts of a *feme covert* should be paid out of her separate estate. And he gives no direction in the decree that the property is to be bound after her death to pay her debts.

I must, therefore, consider the case of *Hulme* v. *Tenant* as only an authority for the principle to the extent I have stated it, and that it is in this limited form only that it is confirmed by Sir *William Grant* in *Heatley* v. *Thomas* (1); that is, that the engagement need not be in writing, but if not in writing, it must be proved that it was entered into with an intention on the part of the married woman of making her separate estate liable to discharge that debt, and this intention will not be inferred from the mere circumstance of her contracting the debt. When I say that the engagement need not be in writing, of course there is this qualification, that if the separate property of the married woman consists of real estate only, the *Statute of Frauds* applies as in every case affecting land; but if she have an absolute interest in personalty settled to her separate use, then a verbal agreement that her personal estate shall be liable to pay the debt will bind it.

On referring to the other cases, I find two, and I think only two, which support the doctrine that the separate estate of the married woman is liable to pay her general debts. In *Field* v. *Sowle* (2), on which Lord Justice *Turner* seems to rely, Sir *John Leach* treats the debt only as an equitable appointment; but the two cases to which I refer confirm the doctrine laid down by Lord Justice *Turner* only indirectly. These are the *Anonymous* case in *Vesey* (3) the proper name of which is *Bruere* v. *Pemberton*, and *Gregory* v. *Lockyer* (4). They are cases of the administration of the separate estate of a married woman after her decease, and it appears to me that the debts were paid *pari passu*, which obviously is inconsistent with the doctrine of paying out of the separate estate only debts which are charged upon it; for, if they be charges, they must be paid according to their priority, and not *pari passu*; but I do not find that that point was argued before the Court (they are reported very shortly), and this mode of administration seems to me to have been adopted inadvertently.

(1) 15 Ves. 596.
(2) 4 Russ. 112.
(3) 18 Ves. 258.
(4) 6 Madd. 90.

The Lord Justice *Turner* seems to consider that in the case of *Vaughan* v. *Vanderstegen* (1) the principles he lays down were adopted and acted upon. But I do not so understand it. In the case of *Vaughan* v. *Vanderstegen,* the Vice-Chancellor decided this, which is stated in the marginal note very accurately: "A married woman having a life estate in personalty to her separate use, with a general power of appointment by will, does not, by exercising the power, make the property applicable to the payment of her engagements in the nature of debts, viz., of such engagements as would be charges on her separate estate;" and in the judgment he said this: "The appointees insist that this principle is not applicable even in the case of a man where, as in the present case, the power is only to be exercised by will and not by deed. No authority is adduced in support of this proposition. It is admitted that if the power authorizes its being executed by deed or will, and the donee exercises it by will, the principle will apply. Now, it is not the mere possession of the power, but the exercise of the power, which can ever give occasion to the application of the principle; and if it will be applied at all when the power is exercised by will, I do see what difference it can make whether the power did or did not authorize its exercise by deed as well as by will." Therefore, it is quite clear that he considered that the decision must be exactly the same, whether the married woman had power to dispose of the property by deed or will, or by will only, provided she exercised the power by will. I agree with everything which the Vice-Chancellor has said in that case with respect to the execution of powers, and I think it unnecessary to repeat it over again. I wish to adopt all his language in that case as exactly conveying my opinion.

The result is that, in my opinion, the rule is, that the liability of the separate estate of a married woman is only created by something which operates as a specific charge upon it, and that this charge can be produced only by an intention on the part of the married woman to create such a charge. I adopt the expression of Sir *John Leach,* in *Stuart* v. *Kirkwall* (2), viz.: "That a *feme covert* being incapable of contract, this Court cannot subject her separate property to general demands. But that, as incident to the

(1) 2 Drew. 165. (2) 3 Madd. 387.

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power of enjoyment of separate property, she has a power to appoint it, and that this Court will consider a security executed by her as an appointment *pro tanto* of her separate estate." The only alteration I would wish to make in this passage is, to strike out the words "appoint" and "appointment," and put in "dispose of" and "disposal," because it is clear it is not an appointment; it is not intended as an appointment in any respect. It is quite certain it is not the execution of a power, and there is a constant discussion in the cases as to what it is. It is nothing more than this, that the married woman has certain property, over which she has exactly the same power of disposition as if she were a *feme sole*, and, therefore, she may dispose of that property as she pleases; she does not "appoint" it in the proper sense of the word; "assign" would be much nearer; but it is, in point of fact, nothing more than a disposition. She disposes of the property, and equity enforces that.

I do not think it necessary to cite in detail the other cases, all of which I have carefully examined, as they appear to me to support the view I have taken. I think, as I have stated, that this view is taken by Vice-Chancellor *Kindersley*, in *Vaughan* v. *Vanderstegen*, and by me in following that decision; and it appears to me to be the only mode by which the authorities can be reconciled with principle. It follows of course, in my opinion, that when a married woman has an estate for life only, and a power of disposition after her decease by will only, this separate property will not, after her decease, be liable to pay her general creditors; and also that, in the administration of the separate estate of a married woman after her decease, the debts are to be paid in order of priority, and not *pari passu*.

I have given to this subject the best attention I have been able, and such is the conclusion at which I have arrived. I regret that the smallness of the amount in question in this case is such as to render the probability of an appeal to the highest tribunal very remote; but I have on this account given the subject, if possible, more consideration than I should otherwise have done. The consequence of my decision is, that the promissory note given by *Elizabeth Rowcliffe* did not constitute any charge on this property,

and that the claim of Mr. *Bridge* in respect of it cannot be allowed. I will make a declaration to that effect.

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Solicitors for the Plaintiff and some of the Defendants: Messrs. *Langley & Gibbon.*

Solicitors for the other Defendants: Mr. *Hogan;* Messrs. *Martineau & Reid;* Messrs. *Stephens & Son.*

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Feb. 19, 20, 21, 22, 23, 26; *April* 18.

Patent—Validity established at Law—Right of subsequent infringer to dispute validity—Injunction—Issue.

The Defendant in a suit to restrain the infringement of a patent is entitled to dispute the validity of the patent, although the Plaintiff has obtained a judgment at law against another person establishing its validity; but until he has proved its invalidity, he will be restrained from infringing it.

In a suit to restrain the infringement of a patent, the validity of which had been established at law against another Defendant, the Court at the hearing, being satisfied of the sufficiency of the specification, the utility of the invention, and the fact of infringement, granted an injunction to restrain the Defendant from infringing the patent, and directed an issue to be tried at law as to the novelty of the invention.

An objection to the validity of a patent on the ground of the expiration of a foreign patent for the same invention cannot be taken at the hearing of a suit to restrain the infringement of the patent, unless it has been raised by the answer.

THIS was the hearing of a suit to restrain the infringement of a patent for improvements in grinding corn, and for an account of the profits made by the Defendant by such infringement.

The patent was taken out in 1849. In 1856, the Plaintiff recovered judgment in an action against *Keyworth* and another for infringement of the patent, the Judge certifying that the validity of the patent came in question, and, upon a motion for a new trial, the Court of Queen's Bench affirmed the validity of the patent: *Bovill* v. *Keyworth* (1). In 1863, the Plaintiff obtained a prolongation of the patent after a strenuous opposition on the part of several millers who appeared by counsel before the Privy

(1) 7 E. & B. 725.

M. R. 1866 BOVILL v. GOODIER (2).

Council, and entered into evidence to disprove the novelty and utility of the invention. The Plaintiff had also commenced actions and suits against several other infringers of his patent, all of whom had submitted to verdicts or injunctions; but there had been no decision upon the validity of the patent except in *Bovill* v. *Keyworth* (1).

The Defendant, by his answer, insisted that the Plaintiff's patent, as appearing by the specification, was not granted for the improvements in the bill alleged, and that such alleged improvements did not constitute any new manufacture within the realm, and that the same were not properly the subject of a patent, and were not new, but had been published and used within the realm before the date of the patent, and that such alleged improvements were not properly or sufficiently described in the specification; he, therefore, denied the validity of the patent, and he also denied infringement.

The Court had refused, upon an interlocutory application by the Plaintiff, to direct issues upon the questions of the validity of the patent and the alleged infringement, and, after replication had been filed, refused to order the Defendant to furnish particulars of his objections to the validity of the patent: see *Bovill* v. *Goodier* (2).

Among the evidence adduced by the Defendant to disprove the novelty of the Plaintiff's invention were three *French* patents, described in a book which was proved to have been deposited in the library of the *British Museum* and also to have been sold by a bookseller in *London*. These patents were not in evidence in *Bovill* v. *Keyworth* (1).

The Defendant also sought to prove the invalidity of the patent under the 25th section of the *Patent Law Amendment Act*, 1852 (15 & 16 Vict. c. 83), by reason of the expiration, in 1860, of a *French* patent, not proved to have been published in *England*, for an invention alleged to be identical with that of the Plaintiff; but the Court refused to entertain this objection, on the ground that it had not been raised by the pleadings.

The Plaintiff was cross-examined in Court, but the cross-examination was principally directed to the question of infringement; the Master of the Rolls having intimated that if it was

(1) 7 E. & B. 725. 3 Jur. N.S. 817 (2) Law Rep. 1 Eq. 35. 35 Beav. 364. 11 Jur. N.S. 900

open to the Defendant to raise the question of the validity of the patent, he should have that question tried by a jury, and that the only questions for the Court now to decide upon that part of the case were, whether the validity of the patent as now claimed by the Plaintiff had been established at law, and whether the Defendant was entitled to dispute its validity in this suit.

Mr. *Grove*, Q.C., Mr. *Baggallay*, Q.C., Mr. *Hindmarch*, Q.C., Mr. *Druce*, and Mr. *Aston*, for the Plaintiff:—

When a patentee has established the legal validity of his patent, this Court is not bound, *ex debito justitiæ*, to allow a subsequent infringer to re-open the question of validity: *Hills* v. *Evans* (1); *Davenport* v. *Goldberg* (2); but upon proof of the infringement will grant an injunction, leaving the infringer to proceed by *scire facias* to repeal the patent. It would be a great hardship to a patentee to be compelled to establish the validity of his patent in a new trial as often as it is infringed. In *Foxwell* v. *Webster* (3), where a patentee sued a great number of persons for alleged infringements of his patent, the Lord Chancellor directed an issue upon the validity of the patent to be tried between the Plaintiff and the Defendants in a few of the suits, the result of which was to be binding upon the Defendants in the remaining suits. Here the validity of the patent has been conclusively established at law, and the decision of the Court of law has been acted upon by the Privy Council in prolonging the patent.

The *Attorney-General* (Sir *R. Palmer*), Mr. *Selwyn*, Q.C., Mr. *Little*, and Mr. *Watkin Williams*, for the Defendant:—

A decision at law establishing the validity of a patent against one person, is not binding upon another person either in equity: *Bridson* v. *Benecke* (4); *Newall* v. *Wilson* (5); *Crosskill* v. *Tuxford* (6); *Crosskill* v. *Evory* (7); *Russell* v. *Barnsley* (8); *Hindmarch* on Patents (9); or at law: *Newall* v. *Elliot* (10). *Daven-*

(1) 31 L. J. (Ch.) 457.
(2) 2 H. & M. 282.
(3) 3 N. R. 180; 9 Jur. N.S. 1096
(4) 12 Beav. 1.
(5) 2 D. M. & G. 282.
(6) 5 L. T. 342.
(7) 10 L. T. 459.
(8) Webs. 472.
(9) P. 306.
(10) 1 H. & C. 797. 9 Jur. N.S. 359

(4) 11 Jur. N.S. 137; 2 De G. J. & S. 250
(3) & 4 De G. J. & S. 77

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port v. *Goldberg* (1) was a case of an interlocutory application, and no authorities were cited; in *Foxwell* v. *Webster* (2) the suits were consolidated at the instance of the Defendants; in *Hills* v. *Evans* (3), the Court did in fact re-try the question of validity. The Defendant does not dispute the validity of the patent according to what he contends to be the true construction, and to be the construction put upon it in *Bovill* v. *Keyworth* (4); but, as so construed, he denies that he has infringed it; if, however, it is to be construed as the Plaintiff by his bill contends, the Defendant denies that it is new, or that its validity has been established. The prolongation of the patent does not affect the question, as the Privy Council only requires a *primâ facie* case of validity to be shewn: *Spence's* Patent (5); *Betts'* Patent (6); *Hills'* Patent (7); *Woodcroft's* Patent (8). The *French* patents were not before the Court of Queen's Bench in *Bovill* v. *Keyworth* (4). There is no hardship in compelling the Plaintiff to re-try the validity of the patent, as he will, if he succeeds, get his full costs, charges and expenses, under the 43rd section of the *Patent Law Amendment Act;* but it would be hard upon the Defendant to be bound by the result of an action, to which he was not a party, and the Defendant in which may not have been aware of, or willing to raise, every possible objection to the patent.

Mr. *Grove*, in reply:—

It is in the discretion of the Court, whether the Plaintiff should be put to re-try the validity of the patent; and unless the Court is satisfied that material fresh evidence can be produced, it will act upon the former decision; *Lister* v. *Eastwood* (9). The construction of the patent must be the same in this Court as in a Court of Law; if, therefore, this Court is satisfied that the Defendant has infringed the patent, he must have infringed that which has been established at law. The question of novelty was fully discussed before the Privy Council.

(1) 2 H. & M. 282.
(2) 3 N. R. 180.
(3) 31 L. J. (Ch.) 457.
(4) 7 E. & B. 725.
(5) 3 De G. & J. 523.
(6) 1 Moo. P. C. (N. S.) 49.
(7) Ibid. 258.
(8) 10 Jur. 363.
(9) 26 L. T. 4.

The questions of the construction of the patent, the effect of the judgment in *Bovill* v. *Keyworth*, the alleged identity of the inventions, which were the subject of the French patents, with that of the Plaintiff, the sufficiency of the Plaintiff's specification, and the alleged infringement, were also very fully argued.

April 18. LORD ROMILLY, M. R.:—

This suit is instituted by the Plaintiff to restrain the Defendant from infringing a patent for improving the grinding of corn. The Defendant, by his answer, contests both the validity of the Plaintiff's patent and also the fact of the infringement of it by him. The history of the Plaintiff's invention is an instance of the troubles which, in the present state of the law, await a successful inventor. The patent in question was taken out by the Plaintiff, in June, 1849. Since then he has been engaged in constant and expensive litigation up to 1863, when the patent was prolonged by the Privy Council for five years. This, however, has not produced any termination to the litigation, of which the present suit is an instance. Much of this is incidental to the nature of things. The claim of having made an invention is not to preclude others from using an old process and old machines, because some person *bonâ fide* believes that he has invented what in truth has been long known; nor ought the fact that one person who has infringed the patent was ignorant of the want of novelty, to preclude another person from shewing that the invention had before been known and been in use. It may well be that Mr. *Bovill* invented the process he has patented, and yet that the same process may have been used by other persons before the date of Mr. *Bovill's* patent; and it would be injustice to stop the use of a process long employed because some other person had subsequently discovered the same process. It would also be unjust, because one person has been unable to prove that the discovery was not new, to prevent another from doing so, and to bind him by a proceeding, over which he had no control, and of which he knew nothing. The consequence is, that in almost every case the patentee has to establish his case from the beginning against any fresh person

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who chooses to impugn the patent, and to contest its validity. At the same time the law properly attaches to a patentee, who has established the validity of his patent, rights superior to those which belong to a patentee who has not done so. The former stands on a different footing, and though the patent may be contested by fresh persons, he will receive protection until the invalidity of it is shewn. The distinction hitherto made by Courts of equity has been this: where the validity of the patent has not been the subject of any legal proceedings, that the patentee must prove its validity before a jury, before the Court of equity will protect him; but having once established its validity, then the Court of equity will protect him against any other person, until that person proves its invalidity. Accordingly, the first thing I have to consider in this case is, whether Mr. *Bovill* has established the validity of his patent in a Court of law. If he has done so, it has been by the case of *Bovill* v. *Keyworth* (1). The Defendant contends that that case does not establish the validity of the Plaintiff's patent, and that if it does, the patent is for an invention which is not infringed by him. The way in which the Defendant puts his case may be shortly stated thus: if the patent be such as is established by the case of *Bovill* v. *Keyworth*, then the Defendant has not infringed it; but if the patent be such as the Plaintiff contends that it is, then its validity is not established by the case of *Bovill* v. *Keyworth*, and the patent so alleged is invalid, principally by reason of its want of novelty.

[His Lordship proceeded to examine the Plaintiff's specification, and the judgment in *Bovill* v. *Keyworth*, and stated his opinion to be, that the validity of the patent, as now claimed by the Plaintiff, had been established by the decision in that case, and that the French patents differed essentially from that of the Plaintiff. He then considered the question of infringement, and after giving his reasons for holding that the Defendant had infringed the patent, continued:—]

I am of opinion that the process used by the Defendant is an infringement of the Plaintiff's patent, that the invention is sufficiently described in the Plaintiff's specification, and that

(1) 7 E. & B. 725.

the patent so described in the specification, and so construed by the Judges of the Court of Queen's Bench, has been determined to be valid, in which decision, as far as I am able to judge from the evidence before me, I desire deferentially to express my concurrence. It certainly had not been my intention, when I began to hear this case, to go into or express any opinion upon the validity of the Plaintiff's patent; but the course which the case has taken and the evidence gone into have compelled me to investigate the matter to the extent of the materials laid before me; and I have thought it proper that having formed an opinion I should express it, as it possibly may have the effect of preventing further litigation. I have therefore arrived, first, at the conclusion that the validity of the Plaintiff's patent, as now claimed by him, has been established at law, and also that the Defendant has infringed that patent. It remains then to be considered, what are the consequences which flow from these conclusions, as regards the Plaintiff and as regards the Defendant. In the first place, as regards the Plaintiff, I am of opinion that he is entitled to a decree for an injunction; but, on the other hand, as regards the Defendant, I am of opinion that I cannot properly compel him to submit to the decision of the Court of Queen's Bench, or to acquiesce in any opinion I may have formed. He was no party to the suit of *Bovill* v. *Keyworth*, he is not bound by the proceedings in that case, and many cases are on record where, after the Plaintiff has established the validity of his patent in one case, it has been decided to be invalid in a second. Numerous cases have been cited before me, to which I need not refer, such as *Bridson* v. *Benecke* (1), and *Crosskill* v. *Tuxford* (2), which establish that the Defendant is not to be concluded by a trial at law, to which he was no party, and that he is not to be driven to contest the validity of the patent by a *scire facias*. It is true that the case of *Davenport* v. *Goldberg* (3), seems to point the other way, and it is also to be borne in mind, that the law was established on this point at a time when the Act of Parliament had not passed, which compels the Court of equity itself to decide any question of law which may come before it without the assistance of any other tribunal, as to which, however, it is proper to observe, that this is not so much a question of

(1) 12 Beav. 1. (2) 5 L. T. 342. (3) 2 H. & M. 282.

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law as of fact. I cannot also but remember that, although I have considered the validity of the patent, I have considered it only so far as regards the effect of the decision in *Bovill* v. *Keyworth*, and the sufficiency of the specification; but as to the question of novelty, I have done so solely on the evidence at present laid before me, and I have also done so reluctantly, because I early felt the difficulty I should have in going into that question, and I checked the entering into it as much as I could consistently with allowing the Defendant to bring forward his case. It is also a matter so far favourable to the Defendant, that the form in which this case comes before me is that of a cause, in which neither side has had an opportunity of knowing before the hearing what evidence he would have to meet, which circumstance tends strongly to prevent the bringing forward of evidence, which might at the hearing be material, until after the opportunity of doing so is lost. It is after considering all these matters that I have come to the conclusion, that the results I have arrived at ought not to prevent the Defendant from having, if he wishes it, a further opportunity of trying this question against the Plaintiff. I regret it much, because of the great expense which it will necessarily entail on both parties; but I think myself bound by the authorities to direct an issue to try whether the Plaintiff is the first and true inventor of the processes described in his specification. This issue I will direct, if the Defendant requires it. I direct no issue as to the utility of the invention, or as to the sufficiency of the specification. I consider the former of those matters to be not contested, or to be established by the evidence; and as to the second, I consider it to be decided definitively in favour of the Plaintiff by the decision in *Bovill* v. *Keyworth*, which I have minutely examined, and in which I have, after consideration, for the reasons I have stated, expressed my concurrence, so far as it is a matter of law, not depending on the novelty of the invention. The novelty of the invention is a question which, in my opinion, I ought to allow the Defendant to try again, if he chooses to do so; but in the meantime, I must restrain him from carrying on his present processes which, in my opinion, infringe the Plaintiff's invention. I will reserve the further hearing of the cause until after the trial of the issue, and give either party liberty to apply.

[The Defendant accepted the offer of the Court, and the issue was directed accordingly to be tried in the Court of Common Pleas, with liberty to the jury to return a special verdict, and the Defendant was ordered to deliver, within seven days from the service of the order, particulars of the publications and cases of prior user of the invention upon which he intended to rely at the trial of the issue.]

Solicitors for the Plaintiff: Messrs. *Harrison, Beal, & Harrison.*
Solicitors for the Defendant: Messrs. *Sole, Turners, & Hardwick.*

COLLETT *v.* COLLETT.

Leases and Sales of Settled Estates Act (19 & 20 *Vict. c.* 120, *s.* 1)—*Settled Estate.*

A testator devised all his real and personal estate to trustees upon trust to sell, and out of the proceeds to pay his debts, and to invest the surplus: and out of the income of the real and personal estate, or of such investments, to pay an annuity to his wife, and subject thereto, to stand possessed of his said real and personal estate for his four children in equal shares: such shares to vest on the children respectively attaining the age of twenty-one, or marrying with consent: and in case of the death of either of his children under twenty-one, or without having been so married, the share of such of them as should so die was to be held in trust for the others, or survivors or survivor of them: and in case all the children should so die, then upon trust for his wife absolutely:—

Held, that, after the death of the widow, the real estate was settled within the meaning of the above Act.

HENRY PARKER COLLETT by his will, dated the 27th of July, 1854, devised and bequeathed all his real and personal estate to trustees upon trust to permit his wife to occupy his residence called *Yately Hall*, and the park adjoining, during her life, provided she should continue his widow; and subject thereto, upon trust to sell, with her consent, all or any part of the said real and personal estate, and out of the proceeds to pay his debts and funeral and testamentary expenses, and to invest the residue; and out of the income of the said real and personal estate, or of such investments, to pay

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to his wife an annuity of £1000 during widowhood; and subject thereto, upon trust to stand possessed of his said real and personal estate, and the income to arise therefrom, upon trust as to one equal fourth part thereof to and for the use and benefit of his child *Cecil Mary Collett*, her heirs, executors, administrators, and assigns; and as to one other equal fourth part thereof, to and for the use and benefit of his child *Helena Parker Collett*, her heirs, executors, administrators, and assigns; and as to one other equal fourth part thereof, to and for the use and benefit of his child *Catherine Ann Spencer Collett*, her heirs, executors, administrators, and assigns; and as to the remaining equal fourth part thereof, to and for the use and benefit of his child *Horace Chambers Collett*, his heirs, executors, administrators, and assigns. And he declared that such fourth parts or shares should become payable to his children on their respectively attaining the age of twenty-one years, or marrying with the consent of his wife; and in case of the death of either of his four children without having attained that age or been so married, the shares of such of them as should so die should be held in trust for and belong to the others or survivors or survivor of them. Then followed a direction for accumulation of the income of the four shares during the minority of the four children, so as to increase the original shares for the benefit of each of his said four children: and to be paid and payable to each of them at the same time with such original share. And in case of all the said children dying, without living to attain the age of twenty-one or to be married, he directed his trustees to stand and be possessed of all the trust property for the sole and exclusive use and benefit of his wife, and her heirs, executors, administrators, and assigns.

The testator died in 1855, leaving his wife and four children him surviving.

The widow died in 1856. One of the daughters had since married. The other children were infants and unmarried.

A petition was now presented under the *Leases and Sales of Settled Estates Act*, to sanction a conditional sale of part of the testator's real estate.

Mr. *Hardy*, for the Petitioners, said that the only question was

whether the estate was a "settled estate" within the meaning of the Act, and referred to *In re Laing's Trusts* (1).

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LORD ROMILLY, M.R.:—

I think you may take the Order.

Solicitors: Messrs. *Parker, Rooke, & Parkers.*

ALSTON *v.* TROLLOPE.

M. R. 1866 *May* 7.

Administration—Debt barred by Statute of Limitations—Waiver of Statute by Executor after Decree for Administration.

After decree in an administration suit, the Court is not bound, on behalf of an absent party beneficially interested in the estate, to disallow claims against the estate barred by the *Statute of Limitations*, if the personal representative, and such of the persons beneficially interested as are parties to the suit or have come in under the decree, do not set up the statute.

THIS was a summons, in a suit for the administration of the estate of *Henry Frederic Alston*, an intestate, by a creditor to vary the Chief Clerk's certificate, so far as it disallowed the claims of the applicant and other creditors of the intestate, as barred by the *Statute of Limitations*.

The intestate died in 1847, leaving a widow, who took out administration, and five children, of whom one was the Plaintiff in the suit, and three had come in under the decree. The fifth, a son, went to *America* in 1862, and was believed to be dead, but had no legal personal representative.

The administratrix and the four children of the intestate, who were before the Court, were willing to waive the objection of the *Statute of Limitations*, but the Chief Clerk considered that in the absence of the fifth child, or his representative, the Court was bound to take the objection and disallow the claims.

Mr. *Osborne Morgan*, for the applicant.

Mr. *Martineau*, for the administratrix and the four children.

(1) Law Rep. 1 Eq. 416.

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LORD ROMILLY, M.R.:—

As the administratrix chooses to waive the objection of the statute I shall not raise it, but it must be understood that the administratrix acts at her own risk, and not under the sanction of the Court. The order to vary the certificate must state that the administratrix does not raise the objection, and that the next of kin, who are parties to the suit, or have been served with the decree, consent to the payment of the debts.

Solicitors for the Applicant: Messrs. *Farrer, Ouvry, & Farrer.*

Solicitors for the Administratrix and next of kin: Messrs. *Walker & Martineau.*

M. R. 1866 *March* 2; *April* 18.

In re DREW'S ESTATE.

Ex parte MASON.

Covenant to repair Private Road—Equitable Charge on Land—Registration of Title—Land Transfer Act (25 & 26 *Vict. c.* 53).

A, the owner of *Blackacre*, and *B*, the owner of *Whiteacre*, mutually covenanted to bear the expense of keeping in repair a private road, of which they had the joint use, in proportion to the acreage of their respective properties, and the deed contained a proviso that in addition to the covenants thereinbefore contained, it was intended that, by virtue of the deed, the expense of the repair of the road should be considered as a charge in equity, and, as far as circumstances would admit, at law also, upon the owners for the time being of *Blackacre* and *Whiteacre* in the above proportions:—

Held, that the proviso did not create a charge on the lands, and consequently that, upon the registration of *Blackacre* with an indefeasible title under the 25 and 26 Vict. c. 53, *B.* was not entitled to have a notice of the proviso entered on the record of title.

THIS was an application, by way of appeal from the decision of the Registrar of the office of Land Registry, to have entered or noticed on the record of title of certain lands about to be registered with an indefeasible title an alleged equitable charge on the lands.

A deed dated the 3rd of August, 1863, and made between *George Henry Drew* of the one part, and *Henry Mason*, the applicant, of the other part, recited the conveyance, by way of sale, by an indenture dated the 1st of August, 1863, by *Drew* to *Mason*, his heirs and assigns, of certain lands, numbered 71 and 72 on a

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plan thereto annexed, with a right of road for *Mason*, his heirs and assigns, and his and their tenants, servants, and others, over a proposed new road described on the plan, so far as it abutted on the lands, and that upon the treaty for the sale it was agreed that *Drew* should enter into such covenants and agreements as were thereafter contained in reference to the formation and reparation of the road, and that the expenses connected with the reparation of the road, so far as it abutted on the lands numbered 71 and 72, should be borne by *Drew*, his heirs, executors, and administrators, and *Mason*, his heirs or assigns, owners for the time being of Nos. 71 and 72, in the proportions following: viz. two-thirds, bearing as nearly as might be the same proportion to the whole as certain lands belonging to *Drew*, adjoining Nos. 71 and 72, and numbered on the plan 73, 74, 75, 76 and 77, bore to the whole area of the lands numbered 71, 72, 73, 74, 75, 76 and 77, should be borne by *Drew*, his heirs, executors, or administrators, and the remaining third by *Mason*, his heirs or assigns, owners as aforesaid, and *Drew* thereby covenanted with *Mason*, his heirs and assigns, that he, his heirs, executors or administrators would, at his or their own expense, make the proposed road, and would after it was completed, and until it should be taken by the parish or other lawfully constituted authority, repair and keep it repaired, and that if he or they should make default in observing the aforesaid covenants, *Mason*, his heirs, executors, administrators, or assigns, might complete or repair the road, and that *Drew*, his heirs, executors, or administrators would repay to *Mason*, his heirs, executors, administrators, or assigns, the whole of the money expended by him or them in completing, and two-thirds of the money expended by him or them in repairing the road, and *Mason* covenanted with *Drew*, his executors, administrators and assigns that, after the completion of the road, he, his heirs, executors, or administrators, or the person or persons who should for the time being be entitled to the lands numbered 71 and 72, would pay to *Drew*, his heirs, executors, or administrators, a third part of all moneys which he or they should have expended in the repair of the road, until it should be taken by the parish or other lawfully constituted authority, and the deed contained the following proviso:—"Provided always, and it is hereby mutually agreed and

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declared between and by the parties to these presents that, in addition to the covenants hereinbefore contained, it is intended that, by virtue of these presents, the costs and expenses of the repair of the said proposed road shall, until the same shall be taken by the parish or other lawfully constituted authority, be considered as a charge in equity, and, as far as circumstances will admit, at law also, upon the owners for the time being, of the several pieces of land numbered respectively 71, 72, 73, 74, 75, 76 and 77 in the said plan, to such an extent as that each such owner, or, if more than one, each set of owners, shall be chargeable with such a part of the costs and expenses of the said repairs, as shall bear the same proportion to the whole of such costs and expenses as the quantity in acres, roods and perches of the said closes or pieces of land, of which he or they shall be the owner or owners, shall bear to the aggregate quantity of the said several closes or pieces of land."

Drew having applied, under the 25 & 26 Vict. c. 53, for the registration, with an indefeasible title, of the lands numbered 73, 74, 75, 76 and 77, *Mason*, being served with notice of *Drew's* application, appeared before the Registrar and claimed to have an entry or notice made on the record of title of the proviso in the deed of the 3rd of August, 1863.

The Registrar decided that the proviso did not constitute a charge on the land intended to be registered, which *Mason* had a right to have entered or noticed on the record; *Mason* thereupon made the present application to the Master of the Rolls, as the Judge to whom the duties of the Court of Chancery in relation to the Act have been assigned, by way of appeal from that decision, to have the proviso entered or noticed on the record.

By the direction of the Lord Chancellor (see *In re Drew's Estate* (1)), a written statement of the case had been prepared, and signed by the Registrar.

Drew was served with notice of the present application, but did not appear.

Mr. *Fry* for the applicant:—

The proviso created a charge on the lands. It was clearly

(1) Law Rep. 1 Ch. 126.

intended to give something more than the mere personal remedy given by the covenants which preceded it, otherwise it would be nugatory; and although it purports to create a charge on the owners of the land, as it was impossible to create a charge upon such owners personally, the Court will construe it, in favour of the obvious intention of the parties, as creating a charge on the land itself, just as deeds ineffectually intended to operate as conveyances have been held to operate as covenants to stand seised to the use of the intended grantees: *Roe* v. *Tranmer* (1). Even if it is not a charge on the land, it is a covenant, which a Court of equity would compel a purchaser, having notice of it, to perform: *Tulk* v. *Moxhay* (2), *Western* v. *MacDermot* (3); but if the title to *Drew's* land is registered without notice of the proviso, the applicant will lose his right against purchasers. The 16th section of the Act shews that it is the policy of the Act to keep open every possibility of claim against registered land. The Court may, under the 17th section, without deciding what is the effect of the proviso, direct such an entry to be made on the record of title as will reserve the rights (if any) of the applicant.

April 18. LORD ROMILLY, M. R., after observing upon the inconvenient form in which the appeal had come before him, no one having appeared to support the Registrar's decision, continued:—

The question is, whether the proviso ought to be entered on the record of indefeasible titles. I agree with the Registrar in thinking that it ought not to be so entered. It is not a covenant running with the land, still less is it a charge on the land. It is simply a personal undertaking on the part of the persons who were parties to the deed that the owners for the time being of the respective lands shall have the same rights and obligations as the parties themselves then had. The deed was not executed by any one but those two persons. In case of any breach of the proviso, the remedy would be not against the land, but against the covenantor.

(1) Willes, 682; 2 Wils. 75. (2) 2 Ph. 774.
(3) Law Rep. 1 Eq. 499. 35 Beav. 243. 12 Jur. N.S. 366

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I am of opinion, therefore, that the Registrar was right in refusing to register the proviso, and I shall make no order upon this application.

Solicitors: Messrs. *Lindsay & Mason.*

M. R. 1866 *May* 25.

BELANEY *v.* BELANEY. 5C 12 Jur NS 440 35 Beav 469.

Will — Gift of "Personal Property, Estate, and Effects" — Real Estate — Term in Gross.

5 Beav 147 12 Jur NS 317

A testator who had purchased a leasehold interest, which was assigned to him, and subsequently the reversion in fee, which was conveyed to a trustee for himself subject to the lease, made a will in these terms:—"I appoint my wife my administrator; I give to my said wife *the whole of my personal property, estate, and effects, of every and whatsoever kind they may be*":—

Held, that the reversion in fee did not pass under the will:

Held, also, that the term passed under the will as a term in gross, and not attendant on the inheritance.

affd by HL. 2 H. & C. 911 H. 2. 2 Ch App 138

THIS was a special case filed by *Juliana Belaney*, the widow and executrix of *Archibald Belaney*, as Plaintiff, against *G. F. Belaney*, his heir-at-law (an infant who appeared by his guardian) and *F. J. Cotton*, a trustee, as Defendants.

The questions submitted for the opinion of the Court related to what passed under the testator's will, dated the 23rd of May, 1865, which was as follows:—

"I hereby appoint my wife *Juliana* my whole and sole administratrix of this my last will and testament. I hereby give and bequeath to my said wife the whole of my personal property, estate, and effects, of every and whatsoever kind they may be, for her sole use and benefit."

The testator left the Defendant, *G. F. Belaney*, and two other children, him surviving.

The property in question had been purchased by the testator, and assigned and conveyed to him by two deeds of assignment and grant.

By an indenture of assignment, dated the 27th of July, 1864,

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a leasehold interest in the property was assigned to the testator for the residue of a term of ninety-nine years, which was still unexpired.

By an indenture of grant, dated the 12th of January, 1865, after a recital that the testator had agreed to purchase the property in question subject to the lease, and that it was his desire that the term should not merge, the reversion in fee was conveyed, subject to the lease, to the use of the Defendant *Cotton*, in trust for the testator in fee.

The questions submitted for the opinion of the Court were, in effect, whether the reversion in fee passed under the will to the Plaintiff, or was undisposed of and passed to the heir-at-law; and whether the term passed under the will to the Plaintiff as a term in gross, or was attendant on the inheritance.

Mr. *E. Charles* for the Plaintiff:—

In this case the reversion in fee, as well as the term, passed to the Plaintiff under the words "all my personal property, estate, and effects." The cases establish two canons of construction: First, that the word "estate" is to have its full force attributed to it, unless it is clear from the rest of the will that it must be otherwise; secondly, that the meaning of the word "estate" is not to be restricted merely from the fact that it occurs in the midst of words that only refer to personal estate, where those words are in themselves sufficient to pass the whole of the personal estate. On the first rule it is unnecessary to cite cases; the second is supported by numerous authorities. In *Terrel* v. *Page* (1), after a devise of lands, under the words "all the rest and residue of my *money, goods, and chattels, and other estate whatsoever*, I give to *J. S.*, whom I make my executor," other lands were held to pass. In *Tilley* v. *Simpson* (2), where a testator, after declaring that he intended to dispose of all his worldly estate, gave "all the residue of his *money, goods, chattels, and estate whatsoever*," to *A. B.*, Lord *Hardwicke* held that an interest in real estate, not before disposed of, passed to *A. B.*, and observed: "If the testator had said 'all the rest and residue of my *personal* estate and estates whatsoever,' a real estate would have passed. This bequest amounts to

(1) 1 Cas. C. 262. (2) 2 T. R. 659, *n.*

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the same, for the word *chattels* is as full a description of personal estate as the word *personal*. Therefore, when he hath used words comprehending all his personal estate, and then makes use of the word *estate*, that word will carry a real estate." That case shows that Lord *Hardwicke* would have considered that, under the words of the present will, the real estate would have passed. In *Jongsma* v. *Jongsma* (1), under a gift of all the testator's "*goods, estates, bonds, debts*," it was held, on the authority of "*Tiddy* v. *Simms*," which is evidently a mistake for *Tilley* v. *Simpson* (2), that the word "estates" so coupled would include copyholds. In *Doe* v. *Evans* (3), where a tenant *pur autre vie* gave to his wife "*all his money, goods, chattels, estate, and effects, of what nature or kind soever*," the residue of the term was held, under the word "estate," to pass to the wife. In *O'Toole* v. *Browne* (4), where the testator had only personal estate at the date of his will, a gift of "*all the residue of my goods, chattels, estate, and effects, of what nature or kind soever*," was held to carry lands which he had afterwards purchased. So in the case of *Midland Counties Railway Company* v. *Oswin* (5) a bequest of "*money, goods, chattels, estates, and effects*" was held to pass real estate.

In the present will there is an evident intention on the part of the testator to give the whole of his estate, both real and personal; he uses the word "whole," and the word "whatsoever;" and the fact of the word "personal" being introduced cannot prevent that intention being carried out, or deprive the word "estate" of its full meaning. The testator left three children, and there is no presumption to be deduced from the will in favour of intestacy, or of an intention to benefit his eldest son. The gift is not to be restricted by reason of the previous appointment of the legatee as executrix. In *Noel* v. *Hoy* (6), where a testator nominated his wife as executrix, "thereby bequeathing to her all the property that he might die possessed of," it was argued that the words applied only to such property as ordinarily passed to an executrix; but Sir *John Leach* held otherwise, and considered that the wife took an estate in copyholds.

(1) 1 Cox, 362.
(2) 2 T. R. 659, *n.*
(3) 9 Ad. & E. 719.
(4) 3 E. & B. 572.
(5) 1 Coll. 74.
(6) 5 Madd. 38.

On these grounds I submit that the term and reversion both passed to the Plaintiff, the word "estate" being equivalent to real estate, and the words "personal property and effects" being sufficient to pass all the personalty.

But even if the Court is against the Plaintiff on this point, at any rate I contend that the term passed to the Plaintiff. The term was purchased first, and by the frame of the deed of January, 1865, by which the reversion was conveyed subject to the term, it was intended to be kept alive as a term in gross, and not to be merged in or be attendant on the inheritance. It was not the case of a satisfied term. In *Gunter* v. *Gunter* (1), where an owner in fee bought up an existing building lease of the property and had it assigned to a trustee for himself, his executors, administrators, and assigns, it was held that the presumption was that the lease had not merged in the inheritance.

LORD ROMILLY, M.R.:—

Mr. *Bevir*, I will not trouble you on the first point. I have no doubt that in order to hold that the real estate passed I must strike out the word "personal" from the will. In the cases cited by Mr. *Charles*, the question was whether, when the word "estate" occurred after a long enumeration of words relating to personal estate, it was to be taken as a word *ejusdem generis*. But those cases have no relation to the present. If the testator had intended to give all his land as well as his personal estate to the Plaintiff, it would not have been necessary to use the word "personal," because the other words, "property and effects," would have been sufficient to pass all the personalty. I cannot introduce a disjunctive preposition, and to give the word "estate" the meaning of real estate I must strike out the word "personal."

I am of opinion that the word "personal" governs all the words "property, estate, and effects," and that the word "estate" is confined to personal estate.

Mr. *Bevir* for the heir-at-law:—

On the other question, I contend that the term did not pass under the will. At the time of the purchase of the reversion by the

(1) 23 Beav. 571: 3 Jur. N.S. 1013.

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testator there was no object in keeping the term alive. The reversion being the principal, the term is accessory. The rule of law is thus stated in *Sugden's* Vendors and Purchasers (1): "It is a general rule that, whenever a term would merge in the inheritance if united, it shall attend, if in a different person. Therefore, when a person purchases the inheritance in his own name, and takes an assignment of a term in the name of a trustee, or takes a conveyance of the fee in the name of a trustee, and an assignment of a term in his own name, in both these cases the term attends the inheritance, unless there be an express declaration to the contrary, whether the term be purchased before or after the purchase of the fee."

In *Dowse* v. *Percival* (2), where a person possessed of a lease bought the reversion, and died, the question was raised whether, there being no direction that it should attend the inheritance, the term was part of the personal estate of the purchaser, but it was decreed that it was attendant on the inheritance. So in *Tiffin* v. *Tiffin* (3), where a purchaser of lands took the fee in his own name, and an assignment of the mortgage term in the names of trustees, on a bill filed by his heir-at-law, a decree was made for the trustees to assign the term to attend the inheritance. In the case of the *Attorney-General* v. *Sands* (4), it was decided that the trust of a term attendant on the inheritance was not forfeited by the attainder for felony of the *cestui que trust*, because it was only an accessory to the inheritance, which was not forfeited. In *Thruxton* v. *Attorney-General* (5), where an owner in fee of lands limited a term to trustees upon such trusts as he should by deed or will appoint, and in default of appointment to attend the inheritance, and afterwards by a nuncupative will gave all to *I. S.*, that was held not to pass the trust of the term. In *Cooke* v. *Cooke* (6) the owner of a term was held to be a *cestui que trust* for the inheritance when there was a covenant for trustees to convey the inheritance, the term and inheritance being regarded as so connected that the term could be severed in favour of the heir or executor. In *Capel* v. *Girdler* (7), where the owner of a term subsequently to his will

(1) Vol. iii. 10th ed. p. 87, 13th Ed. 511.
(2) 1 Vern. 104.
(3) Ibid. 1.
(4) 3 Ch. Rep. 19.
(5) 1 Vern. 340.
(6) 2 Atk. 67.
(7) 9 Ves. 509.

contracted to purchase the inheritance and died before conveyance, the residuary legatees were held to have no claim under the term against the heir. In *Goodright* v. *Sales* (1), where a *cestui que trust* of a term afterwards purchased the reversion in his own name, and devised it to the person whom he appointed his residuary legatee and executrix, on her death it was held that the term went to her heir, and not to her personal representative.

In the present case, as there was no purpose which the term could answer during the life of the testator it was consolidated in the reversion. As the fee did not pass under the will, if the Plaintiff had claimed dower out of the estate what answer could have been given by the heir-at-law to her claim? Judged by this test it is clear that the entire equitable interest is vested in him.

LORD ROMILLY, M.R.:—

I do not doubt the authority of the cases which decide that where there is a legal term vested in another person, the person entitled to the reversion is entitled to call on the trustee of the term to convey it for the benefit of the inheritance. But in the present case the testator had taken care to preserve the term as a term in gross by the form of the deed by which the reversion was conveyed to a trustee in trust for himself subject to the term. The term, therefore, remains as personal estate. Then by his will he gives all his personal property, estate, and effects, to his wife. The term being personal estate, why should it not pass to the Plaintiff? The equitable doctrine that the term must go with the inheritance is another thing. If the testator had devised the land to another, it may be that the devisee would be entitled to claim it; or if he had died intestate, and if the question had arisen between the next of kin and heir-at-law, it may be that the term would have gone to the heir, but when he has shown his intention to keep the term alive by the form of the grant, and then gives all his personal estate to the Plaintiff, the term passes to her under the will.

The costs will come out of the personal estate.

Solicitors: Messrs. *Coode, Kingdon, & Cotton.*

(1) 2 Wils. 329.

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1866
May 7, 8.

In re MADRID BANK.
Ex parte WILLIAMS.

Company—Directors—Promoters—Promotion Money payable on Allotment—Private Agreement between Directors and Promoters—Premature Allotment.

The articles of association of a banking company, with a nominal capital of £1,200,000, in 60,000 shares, of which the prospectus stated that the first issue would be 30,000, empowered the directors to commence business as soon as they thought fit, notwithstanding the whole capital might not have been subscribed for; and provided that upon the first allotment of shares £10,000 should be paid to the promoters. Six weeks after the formation of the company, 5319 shares only having been subscribed for, of which 800 were subscribed for by four directors, the directors allotted the shares, and paid £5000 to the promoters, of which £2000 was, in pursuance of an agreement made before the formation of the company, but not noticed in the articles of association, applied in paying the deposits on the 800 shares of the four directors:—

Held, that the concealment of the agreement between the promoters and the four directors released the shareholders from their contract with the promoters contained in the articles, and also that in making the allotment of shares the directors could not under the circumstances be considered to have exercised their discretion *bonâ fide*; and on these grounds a claim by the promoters in the winding-up of the company for the balance of the £10,000 was disallowed.

THIS was a summons, adjourned from Chambers, upon a claim made in the winding-up of the *Madrid Bank, Limited*, a joint stock company incorporated under the *Companies Act*, 1862, by *George Williams* and *John Edward Williams*, two of the five promoters of the company, to be paid out of the assets of the company £1200, being their proportion of the unpaid balance of a sum of £10,000, payable to the promoters under the articles of association.

The company was incorporated on the 13th of May, 1863, with a nominal capital of £1,200,000 in 60,000 shares of £20 each. The prospectus stated that the first issue would be 30,000 shares, and that a deposit of £1 per share would be payable on application and £1 per share on allotment. The articles of association contained the following provisions:—

"109. The directors shall be at liberty to commence the business

of the company as soon as they shall see fit, notwithstanding the whole capital may not have been then subscribed for or taken."

"112. (1). In consideration of the great labour, expenses, and risk which the promoters have incurred and been put to in and relating to the promotion and formation of the company, and in registering the memorandum and articles of association, and otherwise in forming and bringing the company into operation in *Spain*, as well as in *England*, the directors shall, when and so soon as the allotment of shares under the first issue takes place, pay to the said promoters the sum of £10,000 in full of all charges incurred by the promoters, either on their own behalf, or on behalf of the company, prior to the day on which such allotment of shares shall be made."

On the 29th of June, 1863, 5319 shares having been subscribed for, 800 of which were subscribed for by four of the directors, the directors proceeded to allot the shares; on the 6th of July, 1863, they paid £5000, and on the 20th of June, 1864, £2000, to the promoters, pursuant to the articles. No further allotment of shares was made. The company did scarcely any business, and in March, 1865, was ordered to be wound-up.

The claim was opposed by the official liquidator, principally on the ground that the promoters had privately agreed to pay, and had paid, to four of the directors £500 each, out of the £5000 paid to them in July, 1863.

J. E. Williams, who was cross-examined in court, admitted that £2000 had, in pursuance of an agreement made before the company was incorporated, been paid to the four directors, to be applied in paying the deposits on the 800 shares for which they had subscribed; but he denied that he had any communication with the directors about the allotment.

Mr. *Selwyn*, Q.C., and Mr. *Roxburgh* for the official liquidator:—

The concealment from the shareholders of the agreement between the directors and the promoters vitiates the contract between the company and the promoters.

The allotment contemplated by the 112th clause of the articles was either an allotment of the whole of the 30,000 shares announced by the prospectus as the first issue, or, at all events, an

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allotment of so many shares, as the directors, in the *bonâ fide* exercise of their discretion, should think sufficient to enable the company to commence business; but how could the directors exercise their discretion *bonâ fide*, when they were to receive a premium on making the allotment? The allotment was premature and improper, so few shares having been subscribed for that the whole available capital was absorbed in the payment of the promotion money.

Mr. *Mathew* appeared for a committee of shareholders to support the official liquidator, but the court refused to hear him.

Mr. *Druce* (with him Mr. *Baggallay*, Q.C.), for the claimants:—

The articles, by which the shareholders are bound, gave to the directors absolute discretion as to the issue of shares, and the time of commencing the business of the company, and expressly stipulated for the payment of the promotion money as soon as the first allotment should be made. The money paid to the directors was applied in paying the deposits on their shares, which would not have been payable if there had been no allotment; they had, therefore no inducement to make the allotment prematurely, and having subscribed for a great number of shares, it was their interest not to launch the company without a reasonable prospect of success; but even if the conduct of the directors in making the allotment was improper, the promoters, who had nothing to do with the allotment, are entitled to the benefit of their contract with the company.

Mr. *Roxburgh*, in reply.

May 8th. Lord ROMILLY, M.R., after stating the nature of the claim, and reading the 112th clause of the articles of association, continued:—

In my opinion, all persons who enter into a company must be taken to know the contents of the articles of association, and are bound by a contract contained in those articles; but when an agreement is stated in the articles of association, the whole

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of that agreement should be stated; there ought not to be a sub-agreement, of which the public know nothing, and of which no inkling can be obtained until a later period. Now there was here a sub-agreement prior to the establishment of the company, prior to the filing of the articles of association, that out of the first payment towards this £10,000 £2000 should be paid to, and divided among, four directors. The money was not, as it appears from Mr. *Williams'* evidence, to be paid to them to put into their own pockets, but it was to be paid for the purpose of giving them shares in the company, upon which the deposit upon application and upon allotment were to be paid. The result was that the £2000 was so employed, as far as I can make out from the banker's book. The four directors received, in fact, by this means 800 shares, upon which there was £800 paid for the deposit upon application, and, as I understand it, £1 10*s.* a share upon the allotment (in some of the papers it was said to be £1, but I think it was £1 10*s.*), which would make £1200, and that would make altogether £2000 divided among them; that is to say, they have divided 200 shares a piece. The money was divided among them in that way and they gained the advantage of it.

Another evil arising from this transaction is this, which is a very strong one, that it appears as if 5319 shares in the company had been taken, when in reality, and properly speaking, only 4519 shares had been taken; because it is obvious that these 800 shares ought to be deducted up to the time when the first call was made after the allotment, for the deposit money upon application and upon allotment was paid out of the deposit and allotment money paid in by others. The consequence was, that 4519 shares being the total amount, the number 5319 was illusive.

Then another question is, whether the directors were justified in making this allotment of shares at the time. The 109th clause of the article says the directors shall be at liberty to commence the business of the company as soon as they shall see fit, notwithstanding the whole capital may not have been then subscribed for or taken. Now, I am disposed to construe this clause liberally, and if they had *bonâ fide* exercised their own judgment apart from personal interest, I should have been disposed to have allowed them to exercise their discretion. But I think it is impossible to say

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that this was a *bonâ fide* exercise of their judgment. The promoters were apparently exceedingly anxious to get the promotion money, and they could not get it until the business of the bank or company had begun. The consequence of which was, that although upon these 4519 shares the total amount of deposit that was received was about £9000, or if it was £1 10*s.* a share upon allotment, £11,297, the promoters wished to get the whole of their promotion money, which would practically leave nothing to carry on the business, though it is notorious that in matters of banking a very considerable capital is required to begin with. Now, upon looking over this scheme I did not see anything in it that appears like a bubble scheme. I should have thought it might have been carried into effect with advantage to the shareholders of the company and to the public. But the company having been formed in May, 1863, the directors made an allotment, and apparently attempted to begin business upon the 29th of June, 1863, less than two months after the establishment of the company. Well, it is highly probable that as 4519 shares had been subscribed for within six weeks, as many more might have been subscribed for in another six weeks, or perhaps more than that, and then they might have carried on the concern prosperously. But the result was, that having got this £10,000 or £11,000 from the shareholders, and having divided it amongst themselves, and paid the preliminary expenses that were to be discharged, it was no longer possible for them to carry on the company. They had no assets, and accordingly, I am told, there is in the books of the company only a single entry of a banking description. It is obvious that that state of things did not justify the directors in making an allotment of shares, and therefore, although I consider that they had full power to make an allotment of shares, if they did so *bonâ fide*, and that upon the first allotment of shares the promoters were entitled to receive £10,000 (though the directors were not entitled to receive anything out of that money without the sanction or consent of the shareholders when they became aware of it), yet all these things being mixed up together, I cannot treat this as a *bonâ fide* transaction, and accordingly I am of opinion that the agreement is cancelled and put an end to, and that the promoters cannot insist upon the performance of a con-

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tract respecting which they have not divulged the whole truth to the world, and of which they have pressed the completion and accomplishment for their own personal benefit. I shall, therefore, disallow the claim, but without costs; the official liquidator will have his costs out of the estate.

Solicitors for the Official Liquidator: Messrs. *Treherne & Wolferstan.*

Solicitors for the Claimants: Messrs. *Vallance & Vallance.*

HERBERT *v.* SALISBURY AND YEOVIL RAILWAY COMPANY.

M. R.
1866
May 22

Vendor and Purchaser—Interest—Delay—Interest at increasing Rate, whether Penalty.

A contract for sale of land provided that the purchaser should pay interest on the purchase money at 4 per cent. from the time of taking possession until the 1st of July, 158, the day appointed by the contract for the payment of the purchase money, and after that day at 5 per cent., if the purchase money should not be then paid, and after the 1st of January 1859, at 8 per cent., with a proviso that this should not give the purchaser the right to delay the payment of the purchase money on paying such higher rate of interest. The purchaser took possession of the land in 1857, but owing to circumstances not caused by the misconduct or negligence of the vendor, the purchase was not completed until 1865:—

Held, that the stipulation for payment of a higher rate of interest was not in the nature of a penalty to secure the punctual payment of the purchase money, against which the purchaser was entitled to be relieved, but a separate and distinct contract which he was bound to perform.

IN 1856 and 1857 the *Salisbury* and *Yeovil Railway Company* took by agreement for the purposes of their railway lands, forming part of an estate which belonged to *Robert Henry*, then Earl of *Pembroke*, as to part, as tenant for life under a settlement containing the usual power of sale by trustees, and, as to the remaining part, as tenant in tail with an ultimate reversion to the Crown.

By a memorandum of agreement dated the 31st of January, 1857, and signed by the respective agents of the Earl and the

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company, it was agreed that the price to be paid for the land taken by the company should be at the rate of £200 per acre, that the purchase money should be paid on or before the 1st of July, 1858, for all the lands (except such as Mr. *Robson*, the Earl's land agent, should state to be lands in which the Crown had the reversion) to the trustees of the settlement, and for such Crown lands into the Court of Chancery, that interest should be paid at the rate of 4 per cent. on the purchase money until payment thereof, such interest being calculated from the respective times of the company taking possession of each acre of the land, that from and after the 1st of July, 1858, the company should pay interest at 5 per cent. upon the purchase money, should the same be not then paid, and from and after the 1st of January, 1859, should pay interest at 8 per cent. on all moneys remaining due under the agreement until payment thereof, but that this should not be considered as creating any right on the part of the company to withhold or delay the payment of such moneys upon paying such higher rate of interest.

The company took possession of the land, amounting to about seventy-five acres, at different times between September, 1856, and May, 1857, but the conveyance was not executed and the purchase money was not paid until February, 1865. The delay was attributed by the company partly to difficulties in ascertaining the quantity of land taken from the Earl's estate, and partly to the delay of Mr. *Robson* in distinguishing the lands in which the Crown had the reversion, but there was not, in the opinion of the Court, any evidence that it had been caused by the wilful default or negligence of the vendor or his agents.

Robert Henry Earl of *Pembroke*, died in April, 1862, and thereupon the present Earl, who is an infant, became entitled as tenant in tail to the estate of which the lands taken by the company formed part.

The company refused to pay interest on the purchase money at 8 per cent., insisting that the stipulation for payment at that rate was intended as a penalty to secure the completion of the purchase within a reasonable time, and that, as the delay was occasioned by circumstances over which they had no control, the penalty could not be enforced. They offered, however, to pay interest at 5 per

cent. from the date of the agreement, but this offer was declined by the vendors. The principal was therefore paid and accepted without prejudice to the question of interest, and this suit was instituted by the present Earl and his guardians, and the trustees of the settlement, one of whom was also the sole executor of the late Earl, against the company, for specific performance of the agreement, and for an account and payment of the interest at the rates specified by the agreement.

Mr. *Baggallay*, Q.C., and Mr. *Charles Hall*, for the Plaintiffs:—

The stipulation for payment of interest at 8 per cent. is a distinct and substantive part of the agreement, and there is nothing to show that it was intended to be a penalty for delay on the part of the Defendants. The delay not having been caused by the fraud or negligence of the vendor, the Defendants must be held to their contract: *Lord Palmerston* v. *Turner* (1); *Lord St. Leonards'* Vendors and Purchasers (2), and the cases there cited. It is true that the words "from any cause whatever" are not in this agreement, but those words are mere surplusage.

Mr. *Townsend* (with him Mr. *Selwyn*, Q.C.) for the Defendants:—

It is clear that the ascending scale of interest was intended to be a penalty to secure punctual payment of the purchase money. The proviso that it should not give the Defendants the right to delay such payment shows that this was its real object. That being so, the Court will relieve the Defendants against such a stipulation, as it relieves a mortgagor against a stipulation to raise the rate of interest on the mortgage debt on failure in punctual payment: *Lady Holles* v. *Wyse* (3); *Strode* v, *Parker* (4); *Nicholls* v. *Maynard* (5); *Bonafous* v. *Rybot* (6). In *Williams* v. *Glenton* (7), and the other cases in which purchasers have been held bound by stipulations to pay interest, notwithstanding delay which they could not have avoided, the words "from any cause whatever" have been relied on.

The evidence shows that the delay has been occasioned by

(1) 33 Beav. 524.
(2) Pp. 633—637, 14th ed.
(3) 2 Vern. 289.
(4) Ibid. 316.
(5) 3 Atk. 519.
(6) Burr. 1370.
(7) Law Rep. 1 Ch. 200.

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the vendors, and consequently they can not be allowed to take advantage of their own wrong by exacting the higher rate of interest: *De Visme* v. *De Visme* (1); *Sherwin* v. *Shakspear* (2).

LORD ROMILLY, M.R.:—

I am of opinion that the Plaintiffs are entitled to a decree. I do not think that the cases of *De Visme* v. *De Visme* (1), and *Sherwin* v. *Shakspear* (2), have much reference to this case. Those are cases in which the question was, whether the purchaser was bound to pay any interest at all after he had taken possession. Now here there is no question but that the company are to pay interest. That is not the dispute. The only question is as to the amount of interest which they are to pay. The question which is really before me, and which Mr. *Townsend* has put forward most prominently, is this:—Whether this contract is a contract in which the interest is to be paid in the nature of a penalty against which this Court would relieve. I omit altogether the consideration, whether a distinct and separate suit was necessary for that purpose on behalf of the Defendants, because I think I have all the materials before me, and I think it is competent for me to determine that question. I am of opinion that the contract is a perfectly good contract. The law upon the subject is unquestionably somewhat refined, and leads to very nice distinctions. For instance, it is quite clear that if a mortgagor agrees to pay 5 or 6 per cent. interest, and the mortgagee agrees to take less, say 4 per cent. if it is paid punctually, that is a perfectly good agreement; but if the mortgage interest is at 4 per cent., and there is an agreement that if it is not paid punctually, 5 or 6 per cent. interest shall be paid, that is in the nature of a penalty which this Court will relieve against. I am of opinion, however, that the stipulation in this contract for payment of interest at 8 per cent. is not in the nature of a penalty, but is a separate and distinct contract. It is not the high rate of interest which constitutes a penalty. I apprehend it is quite clear that if a vendor and a purchaser enter into a contract by which the purchaser agrees to pay 10 per cent. interest from the time that he takes possession until the contract is completed, in the absence of

(1) 1 Mac. & G. 336. (2) 17 Beav. 267; 5 D. M. & G. 517.

any fraud or misconduct of the vendor he is bound to pay interest at 10 per cent. Having made that contract with his eyes open, he cannot afterwards complain that that rate of interest is very heavy, or say that, by reason of the interest being very heavy, it is in the nature of a penalty, which the Court of Chancery will relieve against. So also if the contract provides that the purchase money shall be paid in the course of, or at the end of, ten years, and that the interest for the first two years shall be 5 per cent., and the interest for the next two years shall be 6 per cent, and the interest for the next two years shall be 7 per cent., and so on, that is a perfectly good contract. That is quite distinct from a stipulation that if the interest is not paid regularly the amount shall be increased. Here the parties thought fit to enter into this contract, that the rate of interest was to be 4 per cent. up to a certain date, 5 per cent. for the next half year, and 8 per cent. for every subsequent year. I know of nothing to prevent persons from entering into a contract of that description. The proviso that this shall not entitle the persons who are to pay the higher rate of interest to delay the payment of the purchase money, in my opinion, rather tells against them than for them.

If the Plaintiffs had so acted as to make it impossible for the Defendants to complete the contract, and had done that for the purpose of obtaining the higher amount of interest, an ingredient of fraud would have been introduced, which would have entitled the Defendants to say they were not bound to pay any interest at all. It would not be a question as to the rate of interest, but whether they were bound to pay any interest at all. But, upon the evidence, I see nothing to lead to that result. If the delay had arisen from any misconduct on the part of the Plaintiffs, the Defendants might simply have said: "Our money is lying idle, and if you do not do what is necessary to be done, and if you do not complete, we will pay no interest at all; we are ready to pay the whole of the money;" and they could have stopped the interest. The Defendants might have ascertained the quantity of land taken by them as well as the Plaintiffs, and if there had been some dispute as to some portion, they might have paid the amount into Court, and the same with respect to the Crown lands.

I am of opinion that, upon the terms of this contract, the

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Plaintiffs are entitled to the interest as specified, and that I must make a decree accordingly.

Solicitors for the Plaintiffs: Messrs. *Nicholl, Burnett & Newman.*
Solicitors for the Defendants: Messrs. *Hodding, Townsend & Co.*

M. R. 1866 *May* 1, 24.

In re LONDON, HAMBURG, AND CONTINENTAL EXCHANGE BANK.

WARD'S CASE.

Companies Act, 1862, *ss.* 35, 98—*Winding-up—Contributory—Vendor of Shares—Register—Unregistered Purchaser.*

In settling the list of contributories to a company which is being wound-up, the Court is not bound by the register of shareholders; but has authority to rectify the register, and will determine the question who is in equity the real owner of the shares.

Where, therefore, the registered owner of certain shares sold them long before the date of the winding-up order, but in consequence of disputes between the purchasers, his name had not been removed from the register; the Court put the equitable owner of the shares on the list of contributories in the place of the registered owner.

THE *London, Hamburg, & Continental Exchange Bank, Limited,* was established on the 18th of February, 1863. Mr. *Ward* was an original shareholder: in June, 1863, he sold thirty of his shares for the sum of £123 15*s.* to Mr. *Stafford,* through Mr. *Henry,* the broker of the company, and he executed a transfer of the shares to Mr. *Stafford.* This transfer, however, was not acted upon. There were various dealings between *Stafford* and *Henry,* and upon a settlement of account between them, in April, 1864, it was agreed that the shares in question should be transferred to *Henry* for his absolute use and benefit. In May, 1864, *Henry* required *Stafford* to execute a transfer of the shares in pursuance of the agreement; but *Stafford* declined to do so: and in September, 1864, *Henry* applied to Mr. *Ward* to execute a transfer of shares to himself. This at first was refused by Mr. *Ward,* but finally, on receiving an indemnity from *Henry* against any claims of *Stafford,* he executed a transfer to *Henry,* who deposited the document with the company, and applied to have the shares registered

in his name. This would have been done, had not *Stafford* in the mean time given notice to the bank not to register the shares in the name of *Henry* upon the transfer executed by *Ward;* and on this ground the company declined to register the shares. In December, 1864, *Henry* filed a bill against *Stafford* for specific performance of the agreement of April, 1864.

Early in 1865 the bank fell into difficulties: on the 25th of March in that year, a Petition for winding-up was presented by the company, and a winding-up order was made thereon on the 22nd of April following.

On the 21st of May, 1865, *Stafford* filed his answer in the suit; and thereby stated that he was willing to transfer the shares to *Henry.* No further proceedings had been taken in the suit.

Mr. *Ward,* whose name had never been removed from the register, was put on the list of contributories in the winding-up; and he then applied, by summons at Chambers, that either *Henry* or *Stafford* might be put on the list in his place. This summons was now adjourned into Court.

Mr. *E. R. Turner,* for *Ward,* submitted that the person to be put on the list of contributories was the person who ought to have been on the register: *Hyam's Case* (1); *Budd's Case* (2); *Costello's Case* (3). Mr. *Ward* had executed a valid transfer of the shares, the onus of registering it was on *Henry*: *Sayles* v. *Blane* (4); *Walker* v. *Bartlett* (5); *Mayhew's Case* (6); *Nicol's Case* (7): and *Ward* ought not to be prejudiced by *Henry's* default.

Mr. *Swanston,* for *Stafford*:—

Mr. *Stafford* was never the legal owner of the shares; there is no ground for putting him on the register unless he has an equitable interest, and that he disclaims by his answer in the suit.

Mr. *Jessel,* Q.C., and Mr. *Caldecott,* for *Henry*:—

In the first place, *Henry* cannot be put on the register by reason of his having bought the shares in June, 1863; in that transaction he simply acted as agent for *Stafford.* Since

(1) 1 D. F. & J. 75.
(2) 30 Beav. 143; 3 D. F. & J. 297.
(3) 2 D. F. & J. 302.
(4) 14 Q. B. 205.
(5) 18 C. B. 845.
(6) 5 D. M. & G. 837.
(7) 3 De G. & J. 387.

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that time another contract has been entered into between *Henry* and *Stafford:* but it is impossible for *Stafford* now to enforce that contract in equity: he refused to carry it out when the shares were at a premium, and he cannot now turn round and put Mr. *Henry* to a loss by enforcing it. In fact justice cannot be done between the parties upon this application: relief can only be given in a suit properly instituted.

But further, no contract between the parties, short of an actual transfer, is sufficient ground for putting either of them on the register: *Bugg's Case* (1). In *Costello's Case* (2) the shares passed by delivery. *Budd's Case* (3) fell under the *Companies Clauses Act*, and the transferee could have compelled a registration. Here no person can become a proprietor except with the assent of the board of directors; and they have refused on good grounds to accept Mr. *Henry*.

[They referred to *Robinson* v. *Chartered Bank* (4); *Poole* v. *Middleton* (5); *Bermingham* v. *Sheridan* (6).]

Mr. *Selwyn*, Q.C., and Mr. *Roxburgh*, for the official liquidator, took no part in the argument.

May 24. LORD ROMILLY, M.R, after stating the facts of the case, continued:—

Under these circumstances, Mr. *Henry* and Mr. *Stafford* concur in turning against Mr. *Ward*, and they both now insist that as his name remains still on the register, he must appear as the contributory, and that this Court is bound by the list as it appears on the books of the company. Although the fact of the purchase of the shares from *Ward*, in June, 1863, is admitted, although the disappearance of his name from the register has only been prevented by the default and quarrels of Messrs. *Stafford* and *Henry*, and although *Ward* has at all times been ready to do every thing that lay in his power to complete the transfer, they still contend that he must be the shareholder. But I do not concur in this argument. It is

(1) 2 Dr. & Sm. 452.
(2) 2 D. F. & J. 302.
(3) 30 Beav. 143.
(4) Law Rep. 1 Eq. 32.
(5) 29 Beav. 646.
(6) 33 Beav. 660.

clear that if the shares had remained profitable, or had become so, Mr. *Ward* could not have claimed to retain them. I am also of opinion that the purchasers cannot, by means of disputes between themselves, throw the burden of the shares on the seller. If the company had of their own mere motion, and in the exercise of their discretion, refused to accept the transfer of these shares on the ground of some objection to the transferree, and had insisted on Mr. *Ward* remaining on the list, the case would have been different. But when the company themselves made no objection, as was the case here, and the obstacle is produced by the purchasers alone, then I am of opinion that they cannot take advantage of the wrong which they have themselves committed, and by reason thereof throw the burden on the innocent vendor. If I were so to hold, it would follow that no amount of misconduct on the part of the purchaser, even if it amounted to fraud, would enable this Court to make the list of contributories other than identical with the list of the registered shareholders; a doctrine which might be very convenient to the Court, and would avoid much trouble, but which would be productive of great injustice in many cases, and which is not supported, in my opinion, by the authorities cited in support of that proposition.

The 35th section of the statute enables the Court to correct inaccuracies in the register of shareholders. In my opinion this power is not confined to the beginning of the winding-up, or to the date of the winding-up order itself. On the contrary, it is confirmed by the 98th section which directs the Court, after making a winding-up order, to settle the list of contributories, which, if the argument addressed to me were correct, it would be unnecessary to do, as the list of the contributories would be already settled, and there would be no power left in the Court, except to adopt the list as it appears on the books of the company.

I am of opinion, however, that I am compelled to go into the question as to who is in equity the real owner of the shares. It is said that if I do so, I am, in these cases, trying actions at law and determining suits in equity; and in one sense this is true—that is, I am compelled in this case, in order to ascertain who is the contributory, to state the rules of law and principles of equity which, in my opinion, apply to and govern the facts established in

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the evidence before me: and so applying them in the present case, I am of opinion that Mr. *Henry* is the real owner of these shares, and that he must be put on the list of contributories as the holder of these thirty shares so sold to him by Mr. *Ward*, and which, as between himself and Mr. *Stafford*, were taken by him on the settlement of the account between them.

I confess that if I had power to do more in this case than settle the list of contributories, I should be tempted to call on Mr. *Stafford* to shew cause why he should not pay all the costs occasioned by his notice to the company not to register the shares in the name of *Henry*, and also occasioned by his refusing to execute the necessary transfer to him, including in such costs all the costs of the suit instituted by Mr. *Henry* against him. But I have no power to do this. I presume, however, that in the view I take of the evidence in this case, if it be correct, it must be open to Mr. *Henry* to obtain in an action at law compensation for the damage sustained by him by reason of Mr. *Stafford* having so acted. As the matter stands, I shall merely put Mr. *Henry* on the list of contributories for these thirty shares.

The costs of all parties must be paid out of the funds of the company. The only person whose costs I doubted about were those of Mr. *Stafford;* but I am of opinion that his costs of the summons ought also to be allowed notwithstanding the observations I have made upon that subject; and the reason why I think so is, that I am not deciding the rights between Mr. *Henry* and Mr. *Stafford*, or between Mr. *Ward* and Mr. *Stafford*, in any action or suit between them. They are brought here in the character of being, or being supposed to be, liable to be placed on the list of contributories;—a question which could not have been determined in the absence of any one of them, and however much Mr. *Stafford* may have occasioned costs by his conduct towards Mr. *Henry*, I see no fraud for which I can refuse him his costs.

Solicitors for the Official Liquidators: Messrs. *Deane, Chubb, & Saunders.*

Solicitors for Mr. *Ward:* Messrs. *Head & Pattison.*

Solicitor for Mr. *Stafford*: Mr. *H. J. Riches.*

Solicitors for Mr. *Henry*: Messrs. *Edmands & Mayhew.*

In re LONDON, HAMBURG, AND CONTINENTAL EXCHANGE BANK.

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May 2, 24.

EMMERSON'S CASE.

Companies Act, 1862, *s.* 153—*Winding-up—Contributory—Commencement of Winding-up—Sale of Shares before Advertisement—Unregistered Purchaser—Practice—Provisional Liquidator.*

The advertisement of a Petition for winding-up a company is notice to all the world of the Petition: and a vendor of shares is bound to ascertain whether such an advertisement has appeared. Until the appearance of the advertisement, the shares may be dealt with as if no Petition had been presented, assuming such dealings to be strictly *bonâ fide*.

Under s. 153 of the *Companies Act*, 1862, the Court has a discretion to make valid all dealings with the shares between the presentation of the Petition and the order for winding-up: and it will exercise such discretion in all cases of *bonâ fide* sales made previous to the advertisement of the Petition.

The Court will not appoint a provisional liquidator before the hearing of a Petition for winding-up, unless the company consent.

A PETITION for the winding-up of the above-named bank was presented by the company on the 25th of March, 1865. It was first advertised in the *London Gazette* on the 11th of April following, and an order for winding-up was made on the 22nd of April.

On the 6th of April, 1865, Mr. *Emmerson* bought twenty shares in the bank of Mr. *Ward*, to whom they belonged, and in whose name they were registered. The bought note was dated the 11th, and the purchase money was paid on the 19th, of April.

On the 4th of April, 1865, Mr. *Emmerson* bought and paid for twenty shares in the bank. These shares belonged to and were registered in the name of Colonel *Tombs*, by whom a transfer was executed and sent to Mr. *Emmerson*.

In consequence of the winding-up order being made, the names of Mr. *Ward* and Colonel *Tombs* remained on the register of shareholders, and they were put on the list of contributories. They then applied by summons that the name of Mr. *Emmerson* might be substituted. The summonses were now adjourned into Court.

It was admitted that when *Emmerson* bought the shares neither he nor the vendors had any knowledge that the bank was in

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difficulties, or that a Petition had been presented; and it was also admitted that the sales were *bonâ fide* transactions.

Mr. *Everitt*, for Colonel *Tombs*, referred to section 153 of the *Companies Act*, 1862, and submitted that by that section a discretion was given to the Court in cases where there had been *bonâ fide* dealings in the shares after the presentation of the Petition, which, by section 84, is the commencement of the winding-up. If this discretion were not exercised in the present case, then the Act must be read as if the words in question were struck out.

Mr. *E. R. Turner*, for *Ward*:—

In this case *Ward* might have successfully filed a bill for specific performance at any time before he had notice of the winding-up: *Walker* v. *Bartlett* (1); *Beckitt* v. *Bilbrough* (2); *Shaw* v. *Fisher* (3); *Cheale* v. *Kenward* (4). *Emmerson* is therefore the owner of the shares in equity, and ought to be put on the list of contributories.

The effect of section 153 is simply to throw the onus of proof of *bona fides* on the vendor: *Costello's Case* (5).

Mr. *Baggallay*, Q.C., and Mr. *E. K. Karslake*, for Mr. *Emmerson*:—

Admitting that the sales were completed before the advertisement of the Petition, still, under section 153, this goes for nothing unless the Court direct otherwise. In order that the Court may give such direction, there must be something to take the case out of the ordinary class of transactions; but there is nothing of the kind here.

But, further, the transfer of the shares was never completed. The person whose name is on the register is the only one whom the law recognizes as owner of the shares. He may be a trustee for another—a purchaser, for example; but if so, the purchaser must establish his right in equity. But all right to compel a transfer ceases at the commencement of the winding-up. *Hoare's Case* (6); *Bunn's Case* (7).

(1) 18 C. B. 845. 2 Jur. N.S. 643.
(2) 8 Hare, 188.
(3) 5 D. M. & G. 596. 1 Jur. N.S. 1055
(4) 3 De G. & J. 27. 4 Jur. N.S. 984
(5) 2 D. F. & J. 302. 6 Jur. N.S. 1270
(6) 2 J. & H. 229.
(7) 2 D. F. & J. 275. 6 Jur. N.S. 1175

Finally, the sales took place under the common mistake of all parties that the company was solvent, whereas it was not. The Court, therefore, could not specifically enforce the contracts for sale.

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Mr. *Selwyn*, Q.C., and Mr. *Roxburgh*, for the official liquidator.

May 24. LORD ROMILLY, M.R.:—

The facts in this case are as follows, and they give rise to a very important question on the 153rd section of the Act:—Mr. *Ward* sold to Mr. *Emmerson* twenty shares in the company for £90 on the 6th of April, 1865. The bought note bears date the 11th of April, 1865. The sale was perfectly *bonâ fide;* both parties were ignorant that a Petition to wind-up the company had been presented, and both parties believed it to be a solvent and going concern. It was after the Petition was presented, but it was before any advertisements were inserted, that the contract was entered into. I have hitherto held (and further consideration of the subject confirms me in the correctness of my opinion) that the first appearance of the advertisement determines *ipso facto* the position of all the parties, and that it must be treated as notice to all the world; not that it necessarily informs the persons who are dealing with the shares of the company of what has occurred, but because I am of opinion that everybody who sells such shares ought to satisfy himself previously whether any such Petition has been presented; and he is in my opinion bound to make that inquiry before he offers the shares for sale. It may, no doubt, be justly said that this applies to both sides, but it applies with greater force to the seller, because it behoves him not to sell as valuable what is worth nothing.

These observations, however, apply to the present case only to this extent, that holding, as I do, that from the day on which the advertisement appears all parties are bound, I am also of opinion that up to that time it is open to the parties to deal exactly as if the company were not about to be wound-up, assuming, of course, the transaction to be perfectly *bonâ fide* in the strictest sense of the term, and that the vendor has no sort of information whatever as to the instability

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of the company which he conceals from the purchaser. If he does so the fraud vitiates the contract. In addition to this, I regard also the public and the other shareholders; and no transfer of shares with a view to escape from the consequence of having been a shareholder, whether the consequence be pecuniary or moral, when the transferror knew of the condition of the company, will, in my opinion, be valid.

It is important on this subject to refer to the sections of the statute which relate to this point. The 84th section is this: "A winding-up of a company by the Court shall be deemed to commence at the time of the presentation of the Petition for the winding-up." The 114th section is to this effect: "Any Petition for winding-up a company by the Court under this Act shall constitute a *lis pendens* within the terms of the Act" (11 & 12 Vict. c. 45), "provided the same is duly registered in the manner required by such Act concerning suits in equity." That shews that the Legislature seemed to consider that it was necessary to register a Petition in order to make it constitute a *lis pendens*. The next, which is the most important section of all, is the 153rd; and it is in these words [his Lordship read the section]:— The importance of that clause is in introducing the words "unless the Court otherwise orders." It has been contended before me that in fact I ought to disregard those words, and treat them in all cases as void. But by this section a discretion is given to the Court, and I think that the proper mode of exercising that discretion is that which I have already stated. If I adopted the extreme argument founded on this section, that all transactions from the date of the filing of the Petition to wind-up were void, the consequence might be that a Petition to wind-up a company might be presented and filed and not advertised for many months, and no one might be aware of its existence except the Petitioner himself; and then, after the lapse of many months, or even of a year, it might be advertised, and the order to wind-up made; and thereupon all the *bonâ fide* transactions for twelve months previous would be rendered invalid. In my opinion that cannot have been the meaning of the Legislature. It may be observed that the fact of Petitions having been presented and filed, and not advertised for a very considerable length of time, has occurred repeatedly before me,

not to the extent of a year, but of many months; and in several cases the Petition has been dropped, after some negotiation. I think, therefore, that it could not be the meaning of the Legislature to annul all these transactions; and that the discretion given to the Court is in order that *bonâ fide* transactions, and no others, may be made valid.

I am, therefore, of opinion that in this case the sale by *Ward* to *Emmerson* was a valid and binding sale, and that, upon its taking place, so far as concerns the rights and obligations attaching to a shareholder in the company for the twenty shares sold, they ceased to attach to Mr. *Ward* and attached to Mr. *Emmerson;* and that, as he would be entitled to all the dividends and profits, if any, made and declared since that time, so he is also liable to the consequences which attach to the shareholders existing at that time.

The same argument, arising from the actual state of the register, applies to this case as to the last (1); but I refer to the observations I have already made as the reason why I do not adopt that view of the case. It follows that Mr. *Emmerson* must be put on the list of contributories in respect of the twenty shares bought by him from Mr. *Ward* on the 11th of April, 1865.

In Colonel *Tombs'* case, Colonel *Tombs,* by his broker, sold twenty shares to Mr. *Emmerson* on the 4th of April, 1865. The transfer was duly executed by Colonel *Tombs* and sent to Mr. *Emmerson.* In this case, as in the last, the money was duly paid by Mr. *Emmerson,* and the sale was unquestionably a *bonâ fide* one. The shares were not registered in this case, any more than they were in the last, solely by reason of the winding-up of the company. The same observations apply here as they did in the last case. Colonel *Tombs* could have enforced specific performance of this contract, as Mr. *Ward* could in the last, and I abstain from repeating again the observations I have already made; but I hold that Mr. *Emmerson* must be put on the list of contributories in respect of the twenty shares bought by him from Colonel *Tombs.*

The costs of all parties must be paid out of the funds of the company.

(1) *Ward's Case,* ante, p. 226.

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This judgment (1) I wrote immediately after the end of last term, but I think of adding an observation or two strictly german to the present matter, in consequence of some applications made to me lately in Chambers, the repetition of which I wish to prevent (of course subject to any application to the Lords Justices). A company (it is not necessary to mention the name), not failing but still subsisting, having shares in another company, and being aware that it was about to fail, transferred those shares in the failing company to *A. B.*, and then applied to me in Chambers and asked for leave at once, before the list of contributories was made out, to put *A. B.* on the list of shareholders instead of the company which owned the shares; that company undertaking to enter into a guarantee that *A. B.* should pay all the calls upon them, and making themselves liable to that effect. The object, which is very obvious, was to conceal from their own customers the fact that they took shares in the company that failed. Now, I have refused to do that. I am of opinion that that is a case in which the 153rd section applies; that as the tree falls so it must lie; and as the foundation of all equity is truth, if any persons come before me for the purpose of misleading any persons who have placed confidence in them on the supposition that they did not take shares in the company, because their names do not now appear in it, they must not apply to me for that purpose. I shall refuse to make any transfer of that description.

In the case I have mentioned the transfer took place before the actual failure, and before the presentation of any Petition, but when it was known that the failure was impending. The transfer would have been completed but for this circumstance, that upon the presentation of the winding-up Petition, and the filing of it, an application was made for the appointment of a provisional liquidator. It is perhaps convenient that I should state what my practice is with reference to the appointment of provisional liquidators. Where there is no opposition to the winding-up, I appoint a provisional liquidator as a matter of course, on the presentation of the Petition. But where there is an opposition to it, I never do, because I might paralyse all the affairs

(1) His Lordship gave judgment in *Ward's Case* and in *Emmerson's Case* at the same time.

of the company, and afterwards refuse to make the winding-up order at all. But when the directors themselves apply, or do not oppose the winding-up, then I appoint the provisional liquidator. The moment the provisional liquidator is appointed, no transfer can take place in the books, and consequently the transaction by which the shares had been transferred could not be carried into the books, except with my sanction, and that sanction I thought proper to refuse.

Solicitors for the Official Liquidator: Messrs. *Deane, Chubb, & Saunders.*

Solicitors for Mr. *Ward:* Messrs. *Head & Pattison.*

Solicitors for Col. *Tombs:* Messrs. *Clarke, Son, & Rawlins.*

Solicitors for Mr. *Emmerson:* Messrs. *Linklaters, Hackwood, & Addison.*

V.-C. W.

1866

Feb. 21, 22, 23, 26, 27; *March* 1, 28.

DENT *v.* AUCTION MART COMPANY.

PILGRIM *v.* THE SAME.

MERCERS' COMPANY *v.* THE SAME.

Injunction—Light and Air, Obstruction of—Damage, Extent of.

In order to support an injunction to restrain obstructions of light and air, it is generally necessary and sufficient that the case be one in which substantial damages would be recovered at law.

The dictum in *Clarke* v. *Clark* (1), which was supposed to have established a different rule in towns from that which prevails elsewhere, is overruled by *Yates* v. *Jack* (2).

Discussion of circumstances under which the Court will grant an injunction without summoning a jury; also as to distinctions between air and light.

The Court, when considering (as a jury) whether sufficient damage is proved to sustain an injunction, is not bound by the finding of the Appeal Court, upon somewhat similar facts, to the same extent as it is bound by a decision on a point of law.

THE Plaintiffs in the first of these suits, Messrs. *Dent, Palmer, & Co., China* and *East India* merchants, were lessees for twenty-one years from the 24th of June, 1855, of a house, No. 11, *King's Arms Yard*, in the City of *London*, where they carried on business.

The Plaintiffs in the second suit, Messrs. *Pilgrim & Phillips*, were in business as attorneys and solicitors, at a house situate in *Church Court, Lothbury*, under a lease for twenty-one years from the 25th of December, 1859.

Both houses had been occupied by the respective Plaintiffs and their predecessors in title for upwards of twenty years, and the Plaintiffs in the third suit, the *Mercers' Company*, were the owners in fee simple of both houses.

Messrs. *Dent's* house fronted to the west, and stood on the south side of *King's Arms Yard*, which is a street running east and west. On part of the south side of the house, extending to the south-eastern angle, was an open court, belonging to Messrs. *Dent*, measuring about seventeen feet in depth southwards. Into this court, called the south area, looked the window of the "partners'

(1) Law Rep. 1 Ch. 16. (2) Ibid. p. 295.

room," which was the largest in the house, and very lofty, also that of a smaller room called the "sampling room."

The back of Messrs. *Dent's* house looked out upon the backs of houses numbered 23 to 27, *Tokenhouse Yard*, which runs north and south. At about the middle of the back of the house, it formerly joined the backs of the houses in *Tokenhouse Yard*, but further north the premises were separated by a court, belonging to Messrs. *Dent*, about eight feet deep eastwards, and extending to the north-east angle of the house, called the "east area." Into this area looked a bow window, affording side light to a large room in Messrs. *Dent's* house, called the "clerks' room."

At the back of Messrs. *Dent's* house, south of the junction above described, the premises were separated by an open space belonging to the houses in *Tokenhouse Yard*, which gradually widened from six feet six inches to seven feet at the south-east angle of Messrs. *Dent's* house, where it joined and formed part of the "south area," of which a strip along the eastern side in continuation belonged in like manner to the houses in *Tokenhouse Yard*. Into this open space, at the back, looked a staircase window and other windows of Messrs. *Dent's* house.

Messrs. *Pilgrim & Phillips's* house faced south into a court called *Church Court*, on the opposite side of which is *St. Margaret's Church, Lothbury*, the southern and western portions of the court being occupied by an ancient grave-yard. The north of the house was lighted by windows opening into the court already described as the "south area."

The backs of the former houses in *Tokenhouse Yard* were separated from the eastern wall of Messrs. *Pilgrim's* house by an open area of eleven feet in breadth, belonging to the houses in *Tokenhouse Yard*, but at part of the east side of Messrs. *Pilgrim's* house, adjoining the "south area," was a low building, called the "twenty-one foot building," one story high, and about eleven feet deep, which at that point separated Messrs. *Pilgrim's* house from the houses in *Tokenhouse Yard*, and blocked up the passage between the two courts. In like manner as in the "south area," a strip of the eastern side of *Church Court*, about eleven feet broad, belonged to the house in *Tokenhouse Yard*.

The Defendants, the *Auction Mart Company, Limited*, had pur-

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chased the houses in *Tokenhouse Yard;* and the bills alleged that having pulled down the old houses, they were about to rebuild to a height several feet above that of the old houses, and to bring their back wall several feet nearer the eastern boundary of the houses in *King's Arms Yard* and *Church Court,* so that the access of light and air would be seriously diminished, and prayed for injunctions accordingly.

The first two bills were filed in June, and the third in August, 1865, and the motions for injunctions stood over from time to time, upon undertakings. Messrs. *Pilgrim* also prayed that the Defendants might be restrained from excavating their foundations.

From the evidence it appeared that the intention of the Defendants was not only to raise their walls much higher opposite the east area, the staircase windows of Messrs. *Dent's* house, and the south area, but to make a projection immediately south of the staircase windows of Messrs. *Dent's* house, so as entirely to block up that part of the seven-foot space with a wall forty-five feet high. They also intended to bring their back wall within seven feet out of eleven nearer Messrs. *Pilgrim's* house, and to continue their back wall at the same advanced line all the way along the eastern side of *Church Court.* They were also about to raise their back wall in *Church Court* (where there was to be a gable in the roof) at least twenty-one feet higher than formerly.

The result would be, as one of the witnesses deposed, to place the staircase windows of Messrs. *Dent's* house in a dismal stagnant well of small size and great depth; to add a row of ordinary two-story houses on the top of a row of ordinary four-story houses, and nearer by seven feet to the two houses; and to reduce the superficial area of space of which the two houses formerly had full enjoyment (except where the twenty-one foot building stood) from about 454 superficial feet to about 205 feet.

The Defendants admitted that their building would interfere to some extent with the Plaintiffs' light and air, but only to a limited degree, and not to such an extent as to make the houses less comfortable or convenient.

The evidence was directed to the following points:—As to the clerks' room window, they said that the extreme back wall of the Defendants' buildings was not to be higher than the former backs

of the old houses in *Tokenhouse Yard;* and though there was to be a second or inner back a few feet higher, it was "within the line" whereby light formerly reached the clerks' room window.

As to the staircase windows, it was admitted there must be some diminution of both light and air; but it was said that they would still be only in the same condition as the staircase windows of many houses in the city, and that the diminution of light might be remedied by the use of white enamelled tiles, with which the Defendants were willing to face their back wall.

As to the south area and the partners' room window (the construction of which, it was said, might be improved) and the sampling-room window, the like argument was used as with regard to the clerks' room window, that the Defendants' extreme back wall would be ten feet lower than the back wall of the old houses, and that the same "line of light" would be preserved. It was also contended that by the removal altogether of the twenty-one foot building there would be a gain to both houses, inasmuch as a clear space of four feet would now be left in the passage at the east of Messrs. *Pilgrim's* house, thus connecting the "south area" with *Church Court.*

In *Church Court* itself, it was said, Messrs. *Pilgrim's* house could not be seriously affected. It had no windows on its eastern side, and the only obstruction to the front light would be from a wall of increased height running at right angles to it. *Church Court* was large, measuring about 324 square yards in area; the open spaces about Messrs. *Pilgrim's* house would far exceed the sanitary requirements of the *Metropolitan Building Act,* and the front light reached the windows over the roof of *St. Margaret's Church* at an angle of less than forty-five degrees. It was also said that the backs of the Defendants' houses, being constructed of white brick, would yield more reflected light than the dingy backs of the old houses, and that this result might be increased by the use of enamelled tiles.

In reply, the Plaintiffs' witnesses asserted that side light was quite as valuable as front light, and more so in the mornings and evenings, when light was beginning or failing.

The inmates of the house in *Church Court* deposed to a great diminution in light during the last month, since the buildings had

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commenced, compared with what it was before; and Mr. *Phillips* said that he was obliged to use artificial light for an hour or an hour and a half later in the morning and earlier in the afternoon, in consequence of which his eyesight had become affected.

It appeared that during some negotiation which preceded the suits, it had been suggested that Messrs. *Dent* should obtain from the *Mercers' Company* an extended lease of their premises, so as to enable them to make such alterations as would, to some extent, obviate the injurious effects of the Defendants' buildings, and that this was attempted, but the *Mercers' Company* refused. From the earlier part of the Defendants' evidence it further appeared that, during these negotiations, Messrs. *Dent* requested the Defendants to pay them £2000 for the damage and to put up enamelled tiles, but the Defendants refused.

The *Attorney-General* (Sir *R. Palmer*), Mr. *Rolt*, Q.C., and Mr. *Kekewich*, for Messrs. *Dent & Co.*:—

The principles on which the Court interferes in cases of obstruction of light and air have been much discussed of late.

A remark of the Lord Chancellor in *Clarke* v. *Clark* (1) has been observed upon. But that *dictum* does not establish that there is to be one rule in the country and another in towns; but only that you must take into account the circumstances of a town atmosphere in estimating the amount of injury; as in the case of smoke from chimneys: *Tipping* v. *St. Helen's Smelting Company* (2).

[The VICE-CHANCELLOR:—Is there any authority for interference in cases of obstruction of air as distinguished from light?]

Probably not; but the identity of the principle is obvious, and it has been recognised by the *Metropolitan Building Acts*.

In *Stokes* v. *City Offices Company* (3), the Lord Chancellor approved the course taken in this branch of the Court, of directing a reference to Chambers (4). *Yates* v. *Jack* (5), in which an injunction was granted, is now under appeal.

(1) Law Rep. 1 Ch. 16, 18.
(2) Ibid. p. 66.
(3) 13 L. T. (N.S.) 81.
(4) 2 H. & M. 650.
(5) Subsequently affirmed, Law Rep. 1 Ch. 296, *n.*

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Mr. *Rolt*, Q.C., Mr. *Willcock*, Q.C., and Mr. *Bagshawe*, for Messrs. *Pilgrim & Phillips*:—

In this case there is no remedy except in this Court. The issue can only be answered by an order like that in *Stokes* v. *City Offices Company*. A single fact may, if necessary, be found by a jury; but the whole of such a case as this must be dealt with by the mind of a single Judge.

The custom of *London* was repealed by the *Prescription Act* (1); it having been held that the words "any local usage to the contrary notwithstanding," apply to *London* and *York*: *Salters' Company* v. *Jay* (2). But in any case the Defendants are not building on their ancient foundations, and that is the limit of the custom.

On the question of air as distinguished from light, *Aldred's Case* (3), *Moore* v. *Rawson* (4), and *Gale* on Easements (5), apply. *Webb* v. *Bird* (6) is distinguishable from this case.

Mr. *Rolt*, Q.C., and Mr. *Dickinson*, for the *Mercers' Company*:—

A reversioner may bring an action, if the injury be such as to be the commencement of a right which will prevail against the reversioner, when twenty years have run: *Gale* on Easements (7); *Bower* v. *Hill* (8); *Kidgill* v. *Moore* (9); *Wilson* v. *Townend* (10).

If so, the Court will grant an injunction: *Jackson* v. *The Duke of Newcastle* (11).

Mr. *G. M. Giffard*, Q.C., Mr. *Osborne*, Q.C., Mr. *Wickens*, and Mr. *G. N. Colt*, for the Defendants:—

Whatever may be the merits of the first two suits, that of the *Mercers' Company* at least is unnecessary. They have known of every step in the proceeding, and their suit is an unnecessary burden.

The models are inaccurate, and, in any case, the Court cannot decide upon mere inspection of models.

(1) 2 & 3 Wm. 4, c. 71, s. 3.
(2) 3 Q. B. 109.
(3) 9 Rep. 58, *b*.
(4) 3 B. & C. 332.
(5) 3rd ed. p. 290.
(6) 10 C. B. (N. S.) 268.
(7) 3rd ed. pp. 164, 165.
(8) 1 Bing. N. C. 549.
(9) 9 C. B. 364, 368.
(10) 1 Dr. & Sm. 324, 329.
(11) 10 Jur. (N. S.) 688, 690.

6 Jur. N.S. 1109

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The defences are: 1. Neither of the Plaintiffs has made any case. 2. There is nothing to entitle them to anything beyond damages. 3. There can be no ultimate decision without a view, and that view can only be had by means of a jury: *Attorney-General* v. *Nichol* (1); *Jackson* v. *Duke of Newcastle* (2).

In order to entitle a reversioner to bring an action, there must be, not merely a diminution in value, but a diminution in value coupled with an actionable nuisance: *Isenberg* v. *East India Company* (3); *Jackson* v. *Duke of Newcastle.*

In *Stokes* v. *City Offices Company* (4), the warehouse and counting-house were glazed all round so that the front of the house resembled a glass case, and it was said great loss would inevitably ensue. In this case the Plaintiffs do not venture to say they will lose either a client or a customer.

In *Jackson* v. *Duke of Newcastle*, Lord *Westbury* said he would not sit in judgment on the Master of the Rolls, who had himself had a view of the premises. The only result of Lord *Westbury's* observations is that every one who desires to have a jury is entitled to have one.

It is impossible to acquire an easement greater than is afforded by the ostensible use of the premises: *Kent's* Commentaries (5); *Durell* v. *Pritchard* (6); *Curriers' Company* v. *Corbett* (7).

[The following cases were also referred to:—*Martin* v. *Goble* (8); *Johnson* v. *Wyatt* (9); *Back* v. *Stacey* (10); *Clarke* v. *Clark* (11); *Robson* v. *Whittingham* (12).]

Mr. *Rolt*, in reply.

March 28. SIR W. PAGE WOOD, V.C.:—

In these cases, which of late have been extremely frequent, the old doctrine which was established by Lord *Eldon* in *The Attorney-*

(1) 16 Ves. 338.
(2) 10 Jur. (N.S.) 688.
(3) 10 Jur. (N.S.) 221.
(4) 2 H. & M. 650; 13 L. T. (N.S.) 81, on app.
(5) Vol. iii. Ed. of 1850, 581, 584.
(6) Law Rep. 1 Ch. 244.
(7) 2 Dr. & Sm. 355; 13 L. T. (N.S.) 154, on app.
(8) 1 Camp. 320.
(9) 9 Jur. (N. S.) 1333.
(10) 2 C. & P. 465.
(11) Law Rep. 1 Ch. 16.
(12) 12 Jur. (N. S.) 41.

General v. *Nichol*, seems, in substance, never to have been departed from. It is remarkable how few of these instances have occurred since that decision, until within the last ten or twelve years. The cases before Lord *Cottenham* are so few as to be scarcely worth mentioning, nor do they call forth any enunciation by him of the principles on which the Court acts. But the cases have become much more frequent of late, in consequence of the increased desire to erect, in the metropolis and elsewhere, buildings of considerable magnitude, which must, of course, more or less affect houses in their immediate neighbourhood.

The doctrine established in *The Attorney-General* v. *Nichol*, and recognised by Lord *Westbury* in the more recent cases of *Jackson* v. *Duke of Newcastle*, and other cases, was this (1): "There are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained, or an action upon the case, which, however, might be maintained in many cases which would not support an injunction." In that one sentence is contained the whole of the doctrine which of late has been recognised as governing this Court in its decisions; though it is not always easy to apply that doctrine when it has been enunciated.

First of all, it is necessary to ascertain what it is that will at law support a claim for damages in respect of an injury done to a building by the obstruction of light and air; and the authority to which I would refer, in preference to any other upon this subject, is the summing-up of Chief Justice *Best* in the case of *Back* v. *Stacey*, because that summing-up has been approved of by the Lords Justices in a recent case before their Lordships. The Chief Justice told the jury (2): "In order to give a right of action, and sustain the issue, there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable, *and* to prevent the Plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done." With the single exception of reading *or* for *and*, I apprehend that the above statement correctly lays down the doctrine in the manner in which it would now be supported in an action at law.

(1) 16 Ves. 343.

(2) 2 C. & P. 466.

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Now, it is apparent, even in that position at law, that the case is one of considerable difficulty and nicety, as all cases must be which involve matters passing, by gentle gradations, from simple annoyance which is not the subject of damages, to annoyance to the extent of rendering the habitation uncomfortable, or of rendering the mode of carrying on the business less beneficial than it formerly was. I may here remark, that I do not read the expression, "carrying on the business beneficially," as Mr. *Giffard* read it, as depending on the question whether or not the person carrying on the business is likely to lose a customer. I think it probable that Messrs. *Pilgrim*, for example, by carrying on their business by gaslight all day, would not lose a single client; but they would carry it on much less beneficially to themselves, whether in discharging their duty to their clients on the one hand, or in preserving their health and their facility of transacting business on the other.

18 Eq 552

Having arrived at this conclusion with regard to the remedy which would exist at law, we are met with the further difficulty, that in equity we must not always give relief (it was so laid down by Lord *Eldon* and by Lord *Westbury*) where there would be relief given at law. Having considered it in every possible way, I cannot myself arrive at any other conclusion than this: that where substantial damages would be given at law, as distinguished from some small sum of £5, £10, or £20, this Court will interpose; and on this ground, that it cannot be contended that those who are minded to erect a building that will inflict an injury upon their neighbour have a right to purchase him out without any Act of Parliament for that purpose having been obtained. It appears to me it cannot safely be held that this Court will allow parties so to exercise the rights which they may have in their soil as to inflict an injury on their neighbour, if the neighbour is unwilling to take any compensation; or even though he be willing to take compensation, if he is not ready to submit to the valuation of a jury, but insists on his own right to determine what the value of his property is.

3 Eq 333-5.

One of the points which was put in argument illustrates this view. It was said there had been negotiations, and Messrs. *Dent* were willing at one time to have taken £2000 for their right to

oppose the erection of these buildings. After that, it was said to be impossible to regard this as a case of irreparable injury, and that therefore the only ground on which a Court of Equity interferes in cases of trespass failed. If a man says he will take £2000, that affords some measure of the amount of the injury. The argument therefore would result in this—that because a man says he considers the inconvenience and annoyance is so great as not to be estimated by the amount of money damages which a jury would fix, but that he is willing, as persons sometimes are, to sell his comfort and ease for a high pecuniary reward, therefore he is to be compelled to go to a jury, who might award him some £100 or £150. His comfort is to be taken away, not at his own estimate, but at the value which a jury might put on it. That would be conceding to those who are desirous of erecting lofty buildings the existence of some unknown Act of Parliament containing all the provisions of the *Lands Clauses Act*. It appears to me that is a mistaken view of the jurisdiction of the Court.

Take the case of waste. This Court will not, because a value can be put on timber, allow a trespasser to enter on property for the purpose of cutting down another man's trees.

So, again, with regard to the common case of trespass on coal mines. Coals can be valued; but this Court considers it a ground for injunction where a clear and distinct title is disturbed, without any right on the part of the person inflicting the injury, and where, as in the case of the coal mine, there could be no compensation beyond such damages as might be given on a compulsory sale.

The principle on which the Court interferes in these cases is somewhat analogous, as far as value can be compared with comfort, to the case of specific performance, where the Court says, It is not enough to pay a man money; he is entitled to have the specific property which he has acquired, and to be relieved against the breach of contract.

In all these cases the questions are, first, whether damages would be recoverable, and secondly, whether the damages, if recovered, would be such as to authorize this Court to interfere.

I may suggest a case in which the Court would probably not interfere (not merely when the right is of short duration, for I have interfered in cases of very short duration with reference to

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the obstruction of light), but where the whole of the property is about to cease immediately—as, for instance, in the case of notice given under a Railway Act to take a house, when the house is about to be destroyed and razed to the ground in two or three days' time. That is one of the cases in which damages might be given at law, and yet this Court would not think it right to interfere.

Another difficulty which existed at the time when I heard this case has to my mind been removed by the recent decision in *Yates* v. *Jack* (1), namely, a suggestion in the previous case of *Clarke* v. *Clark,* whereby the Lord Chancellor appeared to indicate that there was some difference between the right to protection of a person residing in a town, and the right of a person residing in the country, who would have reason to expect a greater amount of light in his dwelling. I confess it always appeared to me there must have been some misapprehension of the view in which these observations were put forward by the Lord Chancellor, and I should not have felt much embarrassed by them (for they could have been explained) but for an apparent acquiescence in the same view on the part of Lord Justice *Knight Bruce* in *Robson* v. *Whittingham* (2). But I cannot suppose the Lord Chancellor or the Lord Justice to mean, that in reality there is any substantial difference between the right which a Plaintiff has to seek the protection of this Court when he lives in a town, and that which he would have if he resided in the country. In the first place, obstruction of light rarely occurs in the country; towns are the places where light is wanted. The Romans, who were very accurate in their classification of this subject, divided servitudes into "rural" and "town" servitudes; and appropriated to the division of town servitudes the case of *non altius tollendi,* which was considered to be a servitude which would be most likely to occur in a town residence; rarely, if ever, in the country. Further than that, I may refer to the recent decision of *Tipping* v. *St. Helen's Smelting Company Limited* (3), where it was distinctly held, that the being subjected to a large amount of nuisance already is not a reason why one should suffer more; so

(1) Law Rep. 1 Ch. 295. (2) 12 Jur. (N. S.) 41.
(3) 4 B. & S. 608, 616; in H. L. on app. July 5, 1865.

that, if a man can point out an additional chimney which adds to his grievance, he has a right to interfere with the grievance so increased. There is the further observation to be made, which I see the Lord Chancellor has referred to in *Yates* v. *Jack*, that the Legislature of late years appears to have taken a completely opposite view; because, whereas there existed by the custom of London a right to build on the site of an ancient messuage or toft, wholly irrespective of any rights that might be acquired by the neighbours, that right was abolished by the *Prescription Act*. That must have been done on deliberation, as it was decided in *The Salters' Company* v. *Jay* (1) and *Truscott* v. *The Merchant Tailors' Company* (2) that the words, "any local custom notwithstanding," must have reference to the customs that existed in *York* and *London;* and therefore the Legislature must be taken to have thought it unreasonable, even in towns, to continue a privilege of that description. That being so, I confess I should have felt more difficulty than I do now, had it not been for the recent decision in *Yates* v. *Jack*, which puts it beyond all doubt that the Lord Chancellor did not entertain the view which his observations in *Clarke* v. *Clark* were supposed to imply. The Lord Chancellor, in *Yates* v. *Jack*, having regard to this provision of the Legislature, and interfering, as he did, with reluctance, and doubting whether the custom was not better than the law as it now stands, nevertheless said that he had nothing to do but to follow the provisions of the Legislature, and in acting upon them he held that a house raised 50 per cent. in height at a distance of thirty feet from the house of the Plaintiff, was a nuisance within the purview of this Court, against which the Plaintiff, as owner of the house, must be protected.

I observe also that in *Yates* v. *Jack* the Lord Chancellor considered that it was no answer to a Plaintiff complaining that his light had been obstructed to shew that other persons had been able to carry on trade successfully with less light than would remain to the complaining party after the obstruction had been set up. Further than that, he says (which perhaps, if I may be allowed to say so, is going a little beyond what, as far as I am aware, any previous case has decided) that the Plaintiffs' right

(1) 3 Q. B. 109. (2) 11 Ex. 855.

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to an injunction does not depend on the obstruction being injurious to them in the trade for which they actually used the premises, but is "an absolute indefeasible right to the enjoyment of the light, without reference to the purpose for which it has been used." Now that observation certainly goes further than any case has gone since it was decided in *Martin* v. *Goble* (1) that property which had been used for a malt-house could not claim the same privilege as if it had been used for a dwelling-house. But the two authorities may be easily reconciled by saying that the Lord Chancellor's observations may apply to the user of a house as it stands for any purpose for which it may be used in that condition, not to the user of a house when its whole character has been changed and it has been rebuilt, leaving the old windows untouched, as in the malt-house case. But the doctrine has an application to the case before me on the contested question of the sample-room. Although I think upon the evidence there is very little doubt that the room, in Messrs. *Dent's* case, has been occasionally used as a sample-room, the observations of the Lord Chancellor would apply to this—that if the Messrs. *Dent* were minded to use it as a sample-room, it is immaterial whether they have been so using it for the last several years or not.

Having then, as it appears to me, overcome the difficulty as to this property being in a town and not in the country, and having arrived at something like a conclusion that there is a class of cases like the present in which this Court will interfere—that is to say, cases where there is no very great obstruction, but where there is such interference with comfort and with the carrying on of business, that substantial damages would be awarded—I will now dispose of some five or six grounds of defence which have been urged in this case, but which appear to me to be insufficient as equitable defences.

First, it was said that the Plaintiffs have as much light as other persons find sufficient for the same purposes. That was considered by the Lord Chancellor in *Yates* v. *Jack* to be no answer at all to a case of this description, and as to air, it comes to a *reductio ad absurdum*. With regard to that it was said: "The *Metropolitan Building Act* provides that there shall not be any house or hovel,

(1) 1 Camp. 320, 323.

however mean, which shall not have 100 square feet of area for the purpose of ventilation, and you have twice that amount." That is to say, these gentlemen, having carried on their business for a long time, are to have their rights measured by what may be supposed to be the *minimum* to be afforded to persons who inhabit the meanest houses that can be selected for comparison.

Then, secondly, it was argued by the Defendants in *Dent's* case that the Plaintiffs might have made their windows larger. I apprehend it is not for the Defendants to tell the Plaintiffs how they are to construct their house, and to say, "You can avoid this injury by doing something for which you would have no protection. If the Plaintiffs constructed their new window, it could be immediately obstructed as being a new window. They have a right already acquired by their old existing window; that right they wish to have preserved intact; and I think they are clearly entitled to retain the right as they acquired it, without being compelled to make any alteration in their house to enable other people to deal with their property.

Then it is said, thirdly, and this applies to the Messrs. *Pilgrim's* case more than the other, "You have not only constructed your windows originally with less light, but you have actually put up venetian blinds and damaged your own light." The answer to that is obvious. The same thing occurred in *Yates* v. *Jack*. Every now and then, when the light is too much, people pull down their blinds; but that is no reason, because they accommodate the light to their work, that they should be deprived of it at all times.

Then, again, it was said that the sampling-room was not a good room for the purpose; and that the use of the light for sampling had been acquired, *clam;* and it is a well-known rule that rights of this kind cannot be acquired *clam, vi, aut precario*. It was *clam* because they shut themselves up in their house and did not tell their neighbours what they were doing. *Yates* v. *Jack* would be an answer to that. As to its not being a good room for sampling, I dare say it is not, with only thirteen feet space, but it is the best room they have in their house, and they are desirous of preserving it in the state in which it was.

Then, lastly, there was the suggestion of glazed tiles—often made and never listened to by the Court. A person who wishes to

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preserve his light has no power to compel his neighbour to preserve the tiles, or a mirror which might be better, or to keep them clean, nor has he covenants for these purposes that will run with the land, or affect persons who take without notice; and, therefore, it is quite preposterous to say, "Let us damage you, provided we apply such and such a remedy." Therefore, the Defendant properly stands upon his own right, and declines to rely upon the degree of consideration which his neighbour may from time to time shew towards him. The question comes simply back to this: Is there substantially an interference with comfort? Is there a substantial diminution of light for carrying on work?

Now I will take Messrs. *Dent's* case, which I think has been presented with the most remarkable freedom from exaggeration that ever I met with. [His Honour then discussed the evidence, and came to the conclusion that a very large area of the sky, as seen from the upper portion of the windows facing the south area, would be intercepted, and that the case as to these two windows could not be resisted, and continued:—]

GBD/74

Another part of the case is this: There is a staircase lighted in a certain manner by windows which, when opened, admit air. The Defendants are about to shut up these windows, as in a box with the lid off, by a wall about eight or nine feet distant, and some forty-five feet high; and in that circumscribed space they propose to put three water-closets. There are difficulties about the case of air as distinguished from that of light; but the Court has interfered to prevent the total obstruction of all circulation of air; and the introduction of three water-closets into a confined space of this description is, I think, an interference with air which this Court will recognise on the ground of nuisance. This is perhaps the proper ground on which to place the interference of the Court, although in decrees the words "light and air" are often inserted together, as if the two things went *pari passu*.

In the case of the Messrs. *Pilgrim* there is more difficulty. As regards them, the interference with light and the alleged obstruction of air are lateral. Mr. *Phillips*, one of the partners, states that he is already much worse off than he was; though, in fact, the buildings have only been brought nearer, and are not so high as they were before; so that there is considerable compensation in that

respect. Then there is important evidence on the part of scientific witnesses which cannot be disregarded. The Defendants are about to bring the lateral buildings at right angles to Messrs. *Pilgrim's* house, which were before eleven feet off, to within five feet; and they are going to raise the whole building to the height which was previously reached only by about twelve feet of it (though that was directly in front of Mr. *Phillips's* room), which will cause a considerable lateral interception of sky area. The result of the scientific evidence is, that light which formerly fell upon the floor of Mr. *Phillips's* room to the extent of five feet three inches, will now come in only to the extent of one foot; and in another direction light which formerly fell eight feet into the room will now reach it to the extent only of four feet six inches.

In *Yates* v. *Jack* there was scientific evidence of a very similar character, and the Lord Chancellor thought the comparison of the extent to which direct light would reach the floor of the Plaintiff's shop after the erection of the new building, with that which they had previously enjoyed, was evidence of very great force, and could not be treated as mere evidence of opinion.

Therefore, although Mr. *Phillips* may be, and I think is, exaggerating the inconvenience felt at the present time from the unfinished building, yet it does appear to me plain and manifest that there will be a considerable interference with his light.

I have felt some difficulty with reference to recent authorities. I put out of the question *Clarke* v. *Clark*, because the case there was simply this—that a person erected at the side of a window and close to it a sort of screen, the effect of which was very much like the letting down of a window blind, and the Plaintiff complained that the time during which direct sunlight entered the room was greatly reduced. But the Lord Chancellor found that the occupier had made an affidavit of anticipated injury before the building was completed, and after it was completed he did not repeat his evidence as to actual injury; and upon that ground, coupled with the considerations I have already referred to, he thought it was a case in which he could not interfere.

I pass by that and come to *Robson* v. *Whittingham*, in which a man was obliged to burn gas for an hour a day more, and yet Lord Justice *Turner* thought it not a case for an injunction. When

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this Court is put into the position of a jury, it does not feel that it is taking too much upon itself in differing as to a matter of fact from a high authority, from which, on a question of law, it would not presume for one moment to differ. I confess it did strike me as a singular thing that a man should be compelled to wear out his eyes daily by gaslight for one hour a day—and every one knows what the effect of artificial light is upon the human eye—without its being supposed to be any diminution of his comfort. Still there is the decision, and, I confess, that it has put me in a position of some difficulty. I have considered whether I could escape the difficulty by doing that which Mr. *Giffard* so often pressed me to do—by placing the case before a jury. But if the case is put before a jury it must be, in my view, to ascertain whether substantial damage is being done; and if an hour of gaslight being substituted for an hour of daylight is not substantial damage, I should have felt great difficulty how to direct a jury. The benefit of a view, which was also pressed upon me, I think is a good deal exaggerated. If the jury could have had an opportunity of viewing the premises as they existed a year ago, and could be taken to view them as they exist now, the view might be very serviceable. But as it is, I confess I think that by the view the jury is exceedingly likely to be prejudiced; for when a jury view premises as they are, without the slightest knowledge of what they were before, they may be influenced by the remark which was pressed upon me, but which I think is of no value whatever, namely, "Why, there are plenty of people in London who have not so much light as you have." I hold that to be perfectly beside the matter, and the Lord Chancellor in *Yates* v. *Jack* seems to have confirmed that view.

There has been a great deal of learned discussion about side light and direct light, but the question in all these cases, after all, turns upon that which was the parent decision, namely, the *Attorney-General* v. *Nichol*, which was the case of a side light. In that case, although the wall was only intended to be raised from sixteen to twenty feet, Lord *Eldon* granted the *ex parte* injunction, and only dissolved it because he thought the right ought to be tried at law. And it is always to be borne in mind, as the Lord Chancellor observed in commenting on the facts in *Yates* v. *Jack*, that if the

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obstruction of a lateral light is permitted by a neighbour on one side it can be done to the same extent also on the other.

[After some further observations on the facts, his Honour said that he considered the case sufficiently ripe for judgment, and did not feel the necessity of calling in the assistance of a jury. As to that part of the suit of Messrs. *Pilgrim* which related to damaging the foundations, his Honour held, on the evidence, that a sufficient case was made for an inquiry as to damages, and continued:—]

There will be separate decrees in the three causes. I will take Messrs. *Dent's* case as the model;—leaving out in Messrs. *Pilgrim's* suit everything about "air," as I am not satisfied that any case has been made upon which I can interfere in their favour with reference to air—the decree in the *Mercers' Company* to go to both sets of premises—that is to say, to *King's Arms Yard*, as to light and air, and to *Churchyard Court*, as light only.

In *Dent's* case, there will be a perpetual injunction restraining the Defendants from erecting any building so as to darken, hinder, or obstruct the free access of light and air to the ancient windows of the Plaintiffs, as such access was enjoyed previously to the taking down by the Defendants of the houses or buildings which formerly stood on the ground of the Defendants adjoining to the property of the Plaintiffs. Then an inquiry whether any and what buildings have been erected by the Defendants which materially interfere with the access of light and air to any of the windows in the Plaintiffs' messuage. Order the Defendants to remove such buildings, if any, under the direction of the Judge in Chambers. Then a direction (such as was approved by the Lord Chancellor in *Yates* v. *Jack*, and was directed in *Stokes* v. *The City Offices Company*) that the Defendants be at liberty to apply to the Judge in Chambers, as they may be advised, with respect to the erection of any buildings on their property, but not so as to infringe the injunction; with liberty to apply; the Defendants, of course, to pay the costs of the Plaintiffs.

Then, in *Pilgrim's* case, declare that the Defendants were not entitled to excavate the ground at the east end of the Plaintiff's house, so as in any manner to occasion injury and damage thereto by reason of the want of support of the Plaintiffs' house during

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such excavation; and, the Court being of opinion that the said house was so injured by the works in progress on the part of the Defendants at the time of the bill being filed, let an inquiry be made at Chambers what is proper to be allowed in respect of the damage and injury so done to Plaintiffs' house. The rest of the decree to follow the decree in *Dent's* case, leaving out "air;" the Defendants to pay the costs; with liberty to apply.

The decree in the *Mercers' Company's* case will combine the two former, leaving out the part as to the excavations.

As to the costs, there will be a direction to the taxing-master to have regard to the order to use the evidence taken in the *Mercers'* suit in the suit of Messrs. *Dent.*

Solicitors for the Plaintiffs: Messrs. *Freshfields & Newman;* Messrs. *Pilgrim & Phillips;* Mr. *G. F. P. Sutton.*

Solicitors for the Defendants: Messrs. *Kingsford & Dorman.*

V.-C. W. 1866 *April* 20.

BINNS *v.* NICHOLS.

Legacy—Statute of Limitations (3 & 4 *Wm.* 4, *c.* 27, *s.* 40)—*Administration—Real Estate descended subject to Mortgage—Legatee-Mortgagee—Retainer out of personal Estate—Marshalling.*

By the will of a testator who died in 1827, of which *W.* was sole executor, a legacy was bequeathed to *E.*, who died in 1830, having bequeathed her residuary personal estate to *W.* *E.'s* will was proved in 1835 by *W.*, who was afterwards found lunatic from the 3rd of December, 1840. On the 12th of October, 1848, administration with the will annexed of the testator's estate, during the lunacy, was granted to *M.* *W.* died in 1857, and in December, 1858, a bill was filed for the administration of his estate. The legacy had never been paid. The *Statute of Limitations* which applies to the recovery of legacies passed in 1833:—

Held, that a present right to receive the legacy, within the 40th section of the statute, did not accrue to any one until the administration granted to *M.* in October, 1848; and hence that the right to sue for the legacy was not barred.

Where the person liable for the payment of a legacy, and the person entitled to receive it, are the same, no question of limitation under the statute can arise.

Where the executor of a testator is a mortgagee of the real estate, and also

a legatee under his will, he is not bound to satisfy the mortgage debt out of the first sufficient sum of personal assets that comes to his hands; the reason being, that if he were compelled to do so, and thus to exhaust the personal estate, he would be entitled to come against the real estate to the extent to which the legacy remained unsatisfied.

THIS was a motion to vary the Chief Clerk's certificate:—

Joseph Samuel Parkinson died on the 8th of July, 1827, having by his will bequeathed a legacy of £2000 to his mother, *Elizabeth Parkinson*, and appointed his brother, *William Wiggett Parkinson*, his sole executor, who proved the will.

Elizabeth Parkinson died on the 25th of December, 1830, having by her will bequeathed all her personal estate to her son, *W. W. Parkinson*, and appointed him her executor. He proved her will on the 13th of June, 1835.

Several years afterwards *W. W. Parkinson* was found by inquisition to have been a lunatic from the 3rd of December, 1840.

On the 12th of October, 1848, administration of *J. S. Parkinson's* estate, with the will annexed, was granted to the Plaintiff, *Mary Ann Binns*, during the lunacy. She continued such representative until *W. W. Parkinson's* death, which took place in 1857.

The suit was for the administration of *W. W. Parkinson's* estate, and the bill was filed in December, 1858. The Defendant was the executor of *W. W. Parkinson*, who had made a will in a lucid interval. In the course of the suit it had become necessary to administer the personal estate of *J. S. Parkinson* also. The £2000 legacy was never paid, but the Chief Clerk, nevertheless, found that no legacy of *J. S. Parkinson* remained unpaid.

Mr. *Rolt*, Q.C., and Mr. *Speed*, for the Defendant, in support of the motion to vary:—

Twenty years have not expired since the 12th of October, 1848, when first "a present right to receive" the legacy accrued to the Plaintiff, "a person capable of giving a discharge for the same" under section 40 of the *Statute of Limitations* (3 & 4 Wm. 4, c. 27).

Mr. *Daniel*, Q.C., and Mr. *W. Pearson*, for the Plaintiff, in support of the Chief Clerk's finding:—

As against *Elizabeth Parkinson*, the statute, although not passed

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until 1833, began to run from *J. S. Parkinson's* death in 1827; for if she had been alive in 1833, the statute, being retrospective in its operation, would have begun to run against her. The accident of her death does not interfere with the operation of the statute; nor the circumstance that, from the 25th of December, 1830, to the 13th of June, 1835, there was no legal representative of *Elizabeth Parkinson;* nor that, from the 13th of June, 1835, to the 12th of October, 1848, the hand to pay the legacy, and the hand to receive it, namely, that of *W. W. Parkinson*, was the same. The right to sue for the legacy was barred on the 8th of July, 1847, the lunacy of *W. W. Parkinson* not having the effect of preventing the time which had once begun from continuing to run. They referred to *Adams* v. *Barry* (1).

A second point arose in the following way:—

Joseph Samuel Parkinson died intestate as to real estate. At his death he was seised of real estate, which was subject as to part to a mortgage of £1000, and as to other part to a mortgage of £500, carrying £5 per cent. interest, both of which debts were then vested in *W. W. Parkinson.*

Besides being a specialty creditor for £1500, *W. W. Parkinson* was a simple contract creditor. In 1830 he became also, as above stated, executor and residuary legatee of a legatee of £2000 under the same will.

In this suit it became necessary to administer the personal estate of *J. S. Parkinson;* and the Chief Clerk having found that there was in the hands of *W. W. Parkinson*, as his executor, on the 12th of November, 1827, a sum of £1103 13*s.*, and on the 24th of October, 1829, another sum of £715 16*s.* 5*d.*, had treated the mortgage debts as discharged on those two occasions respectively, and had disallowed interest on the debts from those dates respectively.

The Defendant moved that the certificate might be varied by treating the mortgage debts as subsisting, and allowing interest thereon.

The heir and subsequent co-heirs of *J. S. Parkinson* happened to be represented in interest by the Plaintiff; and it thus became

(1) 2 Coll. 290.

their interest to contend that the real estate was discharged of the mortgage debt.

Mr. *Rolt*, Q.C., and Mr. *Speed*, for the Defendant, in support of the motion to vary :—

The heir has a right to have the mortgage paid out of the personalty; but there is no obligation on him to have the real estate so discharged; he may prefer to let the money remain. The discharge only takes place in law when the executor is called upon to pay.

The VICE-CHANCELLOR:—You cannot assume that the mortgagee will not be paid when there are funds. He would not, of course, be obliged to pay himself piecemeal.

Mr. *Rolt*:—Then the case arises of a specialty creditor who has two funds to resort to, the realty and the personalty; if he pays himself out of the personalty, the simple contract creditors and legatees may resort to the realty to that extent.

Mr. *Daniel*, Q.C., and Mr. *W. Pearson*, for the Plaintiff, in support of the Chief Clerk's finding:—

Where the executor is able to retain out of the assets he is bound to do so: *Fox* v. *Garrett* (1). In this case the question of marshalling does not properly arise.

Mr. *Shebbeare*, Mr. *Lindley*, Mr. *Buckton*, and Mr. *Cozens-Hardy*, for other parties.

SIR W. PAGE WOOD, V.C.:—

In this case, although there is some complication, I think I see a way in which right may be done. There is not the least doubt that Mr. *W. W. Parkinson* was entitled to this legacy of £2000. It was first of all given to *Elizabeth Parkinson*, and under her will it devolved upon him; so that in 1830 he became entitled to the legacy, in addition to his mortgage debt of £1500. Some confusion has been created by the suit having been confined in effect to the administration of the personal estate. The suit was for the

(1) 28 Beav. 16.

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administration of the personal estate of *W. W. Parkinson,* and in that suit *J. S. Parkinson's* personal estate had to be investigated. Then it turns out that some time before the passing of the *Statute of Limitations* as to the recovery of legacies, Mrs. *Parkinson,* the legatee, died, and this gentleman became entitled to the legacy. He was executor of *J. S. Parkinson,* a simple contract creditor, a specialty creditor by mortgage, and the executor and universal legatee of this legatee.

Now as to the personal estate, no question about the statute running can arise; because he, having the whole of the first testator's assets in his hands, could not sue himself. The legacy, therefore, was either at home—that is to say, it would have been satisfied if there had been assets—or it was kept alive; because in ordinary circumstances a bill might have been filed to keep it alive; but this gentleman could not have taken so absurd a step as to file a bill against himself for the purpose of making himself pay his own legacy. Hence no question of limitation by time can arise. If he had been executor all the time, it is hardly arguable; but it so happened that he became a lunatic, and in 1848 a limited administration was taken out during the lunacy, and from that date Mrs. *Binns* represented the testator's estate. It has been said that the committee of the lunatic might have filed a bill against Mrs. *Binns;* but even if that were so, we have the case of *Adams* v. *Barry* (1), an authority which exactly meets that point.

In *Adams* v. *Barry* the testator died in 1814, having appointed two executors, *Charles Adams* and *Thomas Wilson.* The latter died in May, 1828, and *Charles Adams* died in 1835. In April, 1842, more than twenty years after the testator's death, the representative of *Charles Adams* filed the bill on behalf of himself and all other the creditors of *Thomas Wilson,* against the representatives of *Thomas Wilson,* to recover residuary assets of the testator, alleged to have been in his hands; and Vice-Chancellor *Knight Bruce* said (p. 293):—

"With regard to the case of *Prior* v. *Horniblow* (2), I am not entirely free from doubt; but I am not aware of any decision contradicting it, and I ought not to decide inconsistently with it, unless

(1) 2 Coll. 290.

(2) 2 Y. & C. Ex. 200.

I had a clear opinion that it is not right, which clear opinion I cannot say that I have. It is, however, I suppose, consistent with that case to say that if, after April, 1822, *Thomas Wilson* possessed himself of any part of the assets of the testator, which ought to have been paid or delivered by *Thomas* to *Sophia Wilson*," (the testator's sole residuary legatee), "her claim against *Thomas's* estate in that respect was not barred when the first bill was filed."

What the Vice-Chancellor held was, that assets which might have been recovered by suit at a period of more than twenty years before the filing of the bill, could not be recovered; but that as to assets that had fallen into possession since, they were not barred.

Now in this case twenty years have not elapsed since 1848, and I cannot hold that before that time *W. W. Parkinson* was barred. The Chief Clerk's finding must be varied by stating that the legacy is still unsatisfied.

The other question is, whether the Chief Clerk is right with respect to the payment of the two sums of £1000 and £500. He finds that one of these sums was paid almost immediately after the testator's death, and that the other was paid about two years later. The Chief Clerk finds that the executor had these amounts in his hands, and that being mortgagee and specialty creditor, he was bound as mortgagee to apply them in payment of his mortgage debt; and I am asked to decide whether the finding is right that he was bound to pay himself the mortgage debt out of these assets. The mortgagee must be taken to have known the law, namely; that if he chose to pay himself his debt out of the personal estate instead of out of the security, the legatees would be entitled to go *pro tanto* against the real estate descended. Therefore, the mortgagee being entitled to pay himself out of the security, or, if he chose not to do so, knowing that a right of marshalling would arise, it is an unreasonable thing to hold that he was bound to pay the specialty debt out of the personalty, when he must have handed over the same amount out of the real estate by way of compensation to the legatees. Neither can it be said that the personal estate is damnified, on the ground

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that, if a mortgagee-legatee keeps his mortgage alive he may obtain £5 per cent., whereas as legatee he would gain only £4 per cent. That is as broad as it is long; because, if he exhausts the personal estate in raising the mortgage debt, the same burden would have to be borne out of the real estate to the extent of his legacy.

In this case, the executor being mortgagee for £1500, and legatee for £2000, and having a right to go against two funds for his mortgage debt, I think he was not bound to pay himself his mortgage debt out of the personalty in his hands.

The Chief Clerk's certificate must therefore be varied by disallowing the allowance, with a declaration of the opinion of the Court to the effect I have stated.

Solicitors for the Plaintiffs: Messrs. *Johnson & Coote.*

Solicitors for the Defendants: Messrs. *Wootton & Son*; Messrs. *Sharpe, Parkers, & Jackson.*

V.-C. W. 1866 *April* 24.

In re HULL AND HORNSEA RAILWAY COMPANY.

*Railway Company—Judgment Creditor—Order for Sale—*27 & 28 *Vict. c.* 112, *s.* 4.

Upon Petition by a judgment creditor of a railway company who had extended the lands (including superfluous lands) of the company under an *elegit*, for a sale under the *Judgment Law Amendment Act*, 1864, the Court directed, 1, inquiries; and 2, in default of payment of the debt and costs within a month of the date of the certificate, a sale under the direction of the Court, of the interest of the company in the lands, or so much thereof as might be necessary to satisfy the Petitioner's claim.

THE Hull and Hornsea Railway Company had executed to the Petitioner *Robinson* a *Lloyd's* bond, dated the 27th of October, 1864, to receive £1857, which bond *Robinson* had, on the 4th of November, 1864, assigned to the other Petitioner, *Emma Young*, for £1700. On the 28th of October, 1865, *Robinson* commenced an action on the bond, and on the 7th of December, 1865, judgment was signed by consent for £4037 18*s.* 6*d.* On the 29th of January last a writ of *elegit* was sued out, and the sheriff extended

all the lands and hereditaments of the company, including some superfluous lands.

The Petitioners now prayed that the railway and the lands so extended and delivered in execution might be sold, under the 4th section of the 27 & 28 Vict. c. 112 (subject as to such superfluous lands to the provisions of the *Lands Clauses Act*), and the proceeds applied in payment of the payment of the Petitioners' debt and costs; or, in the alternative, for a sale of the superfluous lands, and that the proceeds might be applied, &c.

Mr. *Rolt*, Q.C., and Mr. *W. J. Bovill*, for the creditor:—

The sale need not interfere with the powers of management of the directors: *Fripp* v. *Chard Railway Company* (1); *Potts* v. *Warwick, &c., Canal Company* (2); *Walker* v. *Ware, Hadham, and Buntingford Railway Company* (3); *In re Ventnor Harbour Company* (4).

Mr. *G. M. Giffard*, Q.C., and Mr. *Fitzhugh*, for the company:—

The only question is, whether the Court will do more than direct inquiries. It is possible the superfluous lands may be sufficient to pay the debt, and in that case no question need be raised about the sale of the railway.

The VICE-CHANCELLOR directed the following inquiries:—

1. What is due to the Petitioner.

2. What lands have been extended by the Petitioner; what are the nature and particulars of the company's interest in such lands and their title thereto; and whether any lands not required by the company for the purposes of their undertaking have been included in the extent.

3. Whether such lands are subject to any and what other incumbrances or charges, and as to the priorities of such charges.

His Honour then directed the Petitioners' costs to be taxed and added to the debt; the Chief Clerk to certify what should be due; and in default of payment within a month after the date of the

(1) 17 Jur. 887.
(2) Kay, 143.
(3) Law Rep. 1 Eq. 195.
(4) V.-C. W. 13th Jan. 1866.

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certificate, ordered a sale under the direction of the Court of the interest of the company, or so much thereof as might be necessary to satisfy the Petitioners' claim; with liberty to apply for payment either in Court or in Chambers.

Solicitors for the Petitioners: Messrs. *Gregory & Rowcliffes.*
Solicitors for the Respondents: Mr. *S. C. Frankish.*

V.-C. W. 1866 *April* 19, 20.

SMITH *v.* REESE RIVER COMPANY.

Company—Misrepresentation—Prospectus.

A company was formed for mining purposes; the prospectus referred to the memorandum and articles, and described in favourable terms a mine for the purchase of which a contract had been entered into. This mine was afterwards found to be worthless, and the directors rescinded the contract, and agreed to purchase another:—

Held, that a shareholder who had subscribed on the faith of the prospectus was entitled to an injunction against an action for calls, although the directors had been themselves deceived, and had been guilty of no wilful fraud.

THIS was a motion to restrain the *Reese River Silver Mining Company, Limited*, from commencing or prosecuting any action against the Plaintiff for the recovery of a call.

On the 5th of June, 1865, the Plaintiff received a prospectus of the *Reese River Silver Mining Company, Limited*, incorporated under the *Companies Act*, 1862, with a capital of £100,000 in 20,000 shares of £5 each. The prospectus, after calling attention to the unbounded wealth of *Nevada* as a great and recognised fact, and the marvellous purity of the silver extracted from the chloride ores of the region, proceeded as follows:—

"The property which this company has contracted for consists of about fifty acres of land, containing several very valuable claims, some of which are in full operation, and making large daily returns. It is situated between *Austin Landor City* and *Amador*, close to the river, and within half a mile of the already mentioned railroad. The success which has attended all the local companies, as also private individuals, working the silver ores on all sides of these mines is verified by official documents; and the proprietor (who has amassed a large fortune during the last eighteen months by working a few of the claims upon the property con-

tracted to be transferred to this company) has, to show his confidence in the prosperity of the company, agreed to receive the purchase-money in fully paid-up shares only, and to deposit these with the directors as a guarantee for the mines, until returns are made enough to pay interest at the rate of 25 per cent. per annum, before which his shares are not to participate in any dividend whatever."

The prospectus, after some further statements as to the unparalleled richness of the silver lodes found in the *Reese River* district, the geniality of the climate, the pastoral and agricultural resources, forests of timber, and the like, stated that the articles of association and a map of the district could be seen at the company's offices, where further information might be obtained.

The memorandum and articles of association, both dated the 5th of June, 1865, stated the objects of the company thus:—

"To mine for the precious metals, and to reduce the same from their matrix, quartz, and other gold and silver and copper-bearing rocks or earths, and other minerals, for the purpose of gain; the acquisition by purchasing, taking in exchange or on lease, or by mining sett or license, concession, grant or otherwise, of any lands, mines, buildings, easements, rights and privileges, machinery, plant, and other effects whatsoever, which the company from time to time think proper to be acquired for any of their purposes; and the letting, selling, exchanging, or mortgaging any of the landed and other property and effects of the company; the mining and the granting of licenses for mining in or over any lands which may be acquired by the company, and the leasing of any such lands either for mining, building, agricultural, or other purposes, and the erection thereon of mills, stamps, machinery, smelting-works, and all such other works and buildings as may be advantageous to the company's business or businesses; and generally the carrying on the business of a mining, smelting, and crushing company—the doing of all other things whatsoever which the company from time to time may think conducive to the attainment of any of those objects."

Powers were given to the directors to manage the business of the company and (Clause 111):—

"to adopt and carry into effect or rescind, upon terms or otherwise, any contract whether already made or hereafter to be made, by or on behalf of the company, as the directors may in their discretion deem expedient. A certain agreement made between Mr. *Peter Aaris* of the first part, and the subscribers of the memorandum of association hereunto annexed, is hereby confirmed."

(Clause 112.) "The directors may in their absolute discretion take, adopt, or prosecute any proceedings for the purpose of carrying into effect all or any of the objects mentioned in the memorandum of association."

(Clause 113.) "The directors may from time to time purchase or acquire the business and property, or any part of the business or property of any company, partnership, or person carrying on any business included among the objects for which the company is established, upon such terms as the directors may think fit."

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The agreement with Mr. *Peter Aaris* was a provisional contract for the purchase of the mine referred to in the prospectus.

The bill alleged that on the faith of the statements contained in the prospectus, the Plaintiff applied for and obtained an allotment of 100 shares in the company, paying a sum of £100; and on the 2nd of August, 1865, having paid a further sum of £100, he received a certificate of being registered as the proprietor of the 100 shares. On the 30th of December, 1865, the Plaintiff received notice of a call of £1 per share, accompanied by a copy of what was termed "a most satisfactory letter received this day from our deputation at *San Francisco* on their return from the mines at *Reese River*."

From this letter, and a subsequent report of a more formal character, it appeared that the deputation, as they said they had confidently anticipated, had found on reaching the estate, after many dangers and difficulties, that the property contracted to be purchased was not only inferior to the representations made, but actually worthless. They considered, however, that this realization of their worst expectations was matter for rejoicing, and that they had been fully compensated by purchasing, upon the recommendation of a *New York* engineer, "one of the best (if not the finest) mines in the *Reese River* district, at the mere nominal price of 36,000 dollars (£7500),"—consisting (not of fifty acres, the dimensions of the property alluded to in the prospectus, but) of "1200 feet of the great extension of the famous *Confidence* mine ledge, the vein of which is the truest, largest, and richest in the *Reese River* district." The letter and the report contained numerous statements as to the value and richness of the property purchased by the deputation in substitution for that which had been originally contracted for.

The Plaintiff declined to pay the call of £1 per share (for the purpose of meeting the expenses incurred by the deputation), on the ground that he had taken his shares and paid £200 entirely on the faith that the statements contained in the prospectus were correct and *bonâ fide*, and, in particular, in the full assurance and belief that the statements with reference to the property contracted for by the company were true and accurate, and were within the knowledge of the directors. Proceedings to recover the amount

of the call having been threatened, the present bill was filed for the purpose of having the Plaintiff's name removed from the register of shareholders, to obtain repayment of the £200, and to restrain all proceedings for the recovery of the call.

From the affidavit of the directors, filed in opposition to the motion, it appeared that, early in 1865, one *William Jones* was introduced by a Mr. *Anderson* to Mr. *Aaris*, a broker in the city, as the owner of very valuable mining property in the State of *Nevada*, from which he had amassed a large fortune. *Jones* stated that he wished to get rid of this property to save himself the trouble of working it, and suggested to *Aaris* that he should get up a company for purchasing and working it. *Aaris* received all *Jones'* statements in good faith, and embodied them in the prospectus of the company, which he succeeded in forming in June, 1865.

The affidavit went on to state that the directors, after allotting the shares, considered it to be their duty to examine into the truth of Mr. *Jones'* statements, and accordingly sent out *Aaris* and one of the directors as a deputation to *California* to inspect and report upon the property. The directors also stated that they, like *Aaris*, fully believed at the time that the representations made by *Jones* were true. *Aaris* had made an affidavit to the same effect, and the Plaintiff had not cross-examined either him or the directors upon their affidavits.

Mr. *Rolt*, Q.C., and Mr. *Eddis*, in support of the motion, cited *Rawlins* v. *Wickham* (1), and were stopped.

Mr. *Roxburgh* and Mr. *Buchanan*, for the Defendants, opposed the motion, and contended that, under the very wide powers given by the articles of association to which the Plaintiff was, by the prospectus, expressly referred, and of the contents of which he must be held to have notice, the directors had full power to rescind any contract which turned out to be valueless, and make others more beneficial to their shareholders. The statement in the prospectus that the directors "have contracted," did not imply the completed purchase, with the guarantee of an indefeasible title, of this particular property, especially as the articles of association

(1) 3 De G. & J. 304.

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pointed to mining operations generally, without restriction to this particular locality. The directors had acted with perfect good faith, and in full confidence in the representations made to them; and the statement contained in the prospectus was fully justified by the circumstances at the time. Not content, however, to act upon these representations without further inquiry, they had taken the trouble to send a deputation out to *Nevada*, and at once communicated the result to their shareholders.

The Plaintiff must, at all events, be ordered to bring the amount of the call into Court, to abide the result of the suit.

[They referred to *Briggs' Case* (1).]

Mr. *Rolt*, in reply:—

It was the clear duty of the directors before making these statements in their prospectus to have satisfied themselves that they were true. The Plaintiff ought not to be put upon any terms as to bringing the amount into Court. He has already had to pay £200 for his shares, and if it should be ultimately decided that he is liable to pay the call, he will have to pay interest upon it.

SIR W. PAGE WOOD, V.-C.:—

I entertain a strong opinion that the misrepresentations which were made in the prospectus published by the company, have a material bearing upon the right of the company to retain the name of the Plaintiff upon the register of shareholders.

Passing over the first statement in the prospectus as to the wealth of the state of *Nevada*, where the property was situate which the company had contracted for, and as to the large daily returns and the official documents, all which statements may or may not be true, I find statements as to the value of the particular property contracted for, and the large fortune amassed by the proprietor. Were the directors of the company in a position to make these statements on the faith of which persons have been invited to subscribe the articles of association?

Now all that the directors knew was that *Anderson* had introduced *Jones* to *Aaris*, who signed a contract which embodied

(1) Law Rep. 1 Eq. 483.

the statements contained in the prospectus as to the mine. All this story in the prospectus was an absolute falsehood. Singularly enough the directors, who should have examined into the truth of the prospectus before putting it forward on behalf of the company, suddenly awake to their duties when they have caught their subscribers. They say that they considered it their duty, as directors of the company, to send out a deputation to inspect the property and inquire into its value before proceeding to work it. The deputation send back a report which reads more like a novel than anything in real life. They say that their anticipations regarding the property belonging to *Jones* have been more than realized as it was found to be almost valueless, but that this was a matter for rejoicing. Why for rejoicing it is difficult to understand. It might have been so if they could thus have escaped a ruinous contract; but this was not the case, as the contract was not binding upon the company if the company declined to complete it. The directors therefore have put forward statements concerning the contract entered into which were wholly untrue, and which they had no reasonable ground for believing to be true. It was urged on behalf of the Defendants that this company was formed not merely to carry out this particular contract, but for the general purposes and objects stated in the memorandum of association. I admit that the Plaintiff must be taken to have had full notice, and to be bound by the contents of the memorandum and articles of association; but the fact that the company had power to work other mines is not sufficient to absolve them from the misrepresentations contained in the prospectus as to this particular property. It is true that the prospectus stated that further information might be obtained at the company's offices; but this was not enough to put persons intending to apply for shares upon inquiry whether statements put forward by the directors were true or false. Looking at the character of the case, and the fact that the Plaintiff has already paid £200, I do not consider that he ought to be required to pay the amount of the call into Court. There will be an injunction in the terms of the notice of motion.

Solicitors for the Plaintiff: Messrs. *Flux & Argles.*
Solicitor for the Defendants: Mr. *George Lawrence.*

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LEWERS *v.* THE EARL OF SHAFTESBURY.

Practice—Damages—21 & 22 Vict. c. 27—Specific Performance.

When the Plaintiff fails to establish any covenant, contract, or agreement, of which specific performance can be directed, the Court has no jurisdiction to grant relief in damages.

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BILL for specific performance of an alleged agreement by the Defendant's agent to grant a twenty-one years' lease of a farm to Plaintiff, who, on the faith of such agreement being valid and binding, had expended money upon the farm, which he occupied for five years. The bill contained the usual prayer for compensation "for all damage and loss occasioned to Plaintiff in relation to the premises"—"in addition to or in substitution for all or any part of the other relief prayed."

Mr. *Rolt*, Q.C., and Mr. *Kay*, for the Plaintiff.

The *Attorney-General* (Sir *R. Palmer*), Sir *Hugh Cairns*, Q.C., and Mr. *Speed*, for the Defendant, were not called upon.

The VICE-CHANCELLOR held that the Plaintiff had entirely failed to make out the existence of any definite agreement capable of being enforced by this Court.

Mr. *Kay*, on behalf of the Plaintiff, submitted that although he could not obtain specific performance of the agreement for a lease, he was, at any rate, entitled to relief in damages, under the discretionary power given to the Court by 21 & 22 Vict. c. 27, s. 2 (1), and especially having regard to the heavy outlay incurred

(1) Section 2 is as follows:—

"In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, *either in addition to, or in substitution for such injunction*, or specific performance, and such damages may be assessed in such manner as the Court shall direct."

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by the Plaintiff on the faith of there being a binding agreement for a twenty-one years' lease.

SIR W. PAGE WOOD, V.-C.:—

I have no jurisdiction to deal with the question of damages, as I have held that there has been no agreement established which is capable of being specifically performed. Where the existence of an agreement is made out, the Court may think it better to give relief in damages than to perform the agreement, but the relief thus given is by the words of the statute (21 & 22 Vict. c. 27), "in addition to or in substitution for" specific performance, and implies the existence of an agreement between the parties capable of being specifically performed. Here, as there is no such agreement, I have no jurisdiction at all over the matter, and I cannot award any compensation to the Plaintiff for the disappointment he may have been subjected to from not having succeeded in obtaining a definite agreement from the Plaintiff or his agent.

Solicitors for the Plaintiff: Messrs. *Lovell & Co.*
Solicitors for the Defendant: Messrs. *Baxter, Rose, & Norton.*

CLINCH *v.* FINANCIAL CORPORATION.

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1866
April 28.

Production of Documents—Discovery—Joint possession.

In answer to an order against a company, its directors, managing director and secretary, for the production of documents, the directors filed affidavits, stating that they had not in their possession or power any documents other than those which might be in the possession of the company. They afterwards made further affidavits in which they stated that they had no documents whatever in their possession or power:—

Held, that the affidavits were insufficient; and that the Defendants were bound to give upon oath all the information in their power, as to the documents in possession of their company.

IN answer to the common order against the Defendants, the *Financial Corporation, Limited*, the *Oriental Commercial Bank, Limited*, and the other Defendants, for affidavit and production of

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documents, the directors of the bank filed affidavits, stating that to the best of their knowledge and belief they had not and never had in their possession or power any deed or other document whatsoever relating to the matters in question in the suit, *other than such as might be in possession of the bank* or its solicitors, and which would be accounted for in the affidavit to be made by the manager of the bank; and the secretary of the bank deposed that he had not, and never had, in his possession or power any deed or document other than the documents referred to in the schedule; and the only document mentioned in the schedule was the minute book of the corporation, which was then at the offices of the bank.

The fact was, that the corporation had combined with, and had sold or transferred all its property and business to the bank.

By another order, made on the Plaintiff's application on the 20th of February, the Defendants were ordered on or before the 6th of March (afterwards extended to the 12th) to make and file further full and sufficient affidavits as to documents, the Judge being of opinion that the former were insufficient.

In answer, the directors of the bank denied the possession of any documents whatever, and this summons to consider the sufficiency of the further affidavits was now adjourned into Court.

The secretary of the bank, in answer to the second order, had made an affidavit which was considered sufficient, and was not included in the summons, by which he admitted the possession of numerous documents.

Mr. *A. E. Miller*, for the Plaintiffs:—

The further affidavits are insufficient. They contradict the answer, which admits a deed of combination or transfer dated the 17th of May, 1865, and other documents, and they contradict the former affidavits. He cited *Stuart* v. *Lord Bute* (1), *Attorney-General* v. *East Retford* (2), *Acomb* v. *Landed Estates Company* (3).

Mr. *Little*, for the Defendants, the directors of the bank:—

No doubt the directors were in error to admit the possession

(1) 11 Sim. 442. (2) 2 My. & K. 35. (3) 14 W. R. 387.

of any document whatever. All the documents are in the possession of the bank; and they have no independent or other possession.

The object of the suit is simply to set aside the amalgamation.

SIR W. PAGE WOOD, V.C.:—

The Defendants have probably been led into a very natural misconception by the form of the order, which seems to point to their separate and private possession only. But these documents, though in substance they may be the property of the bank, are in the possession or power of the directors, who are the only persons who can give an order for their production. The attempt has often been made in one way or the other to escape the personal order for production, on the ground of the ownership of the documents being in a corporate or partnership body. I myself recollect, as a pleader, having attempted it unsuccessfully in *Taylor* v. *Rundell* (1). But it has always been decided that the parties must give all the information in their power, even if the documents be not in their possession in this sense, that they cannot be produced without an order for the purpose, because they are in the joint possession of the directors and others. The Court says, if you have any possession—that is enough. There may be grounds for not producing; but even then you must give discovery.

Those gentlemen, therefore, must give all the information they can; the Plaintiff is entitled to the benefit of their oaths; and they must be ordered to make a further affidavit.

Solicitors for the Plaintiff: Messrs. *Lowless, Nelson & Goodman.*
Solicitors for the Defendants: Messrs. *Langford & Marsden.*

(1) Cr. & P. 104.

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SWANSEA VALE RAILWAY COMPANY *v.* BUDD.

Production of Documents—Engineering Plans—Surveyor, Inspection by.

Where the issue in a cause depended in a great measure upon the state of the originals of certain engineering plans and documents, and the Defendant deposed that he was not possessed of any engineering knowledge, and that an inspection of the documents would be useless to him without the aid and assistance of an engineer, the order for production and inspection of documents was directed to extend to the Defendant's surveyor.

THIS was an adjourned summons by the Defendant, who, on the 13th of July, 1865, had obtained an order for the production of the Plaintiffs' documents, that the liberty to inspect and take copies might extend to the inspection and taking of copies of such documents by the Defendant's surveyor, Mr. *Fisher*, by their accountant, Mr. *Ace*, and by the clerk or clerks of their solicitor, Mr. *Jenkin*, and such experts and other persons as the Defendant might direct and appoint.

The bill was filed against the Defendant, *J. P. Budd*, as the registered public officer of the *Ystalyfera Iron Company*, for enforcing specific performance of an agreement, and to restrain certain actions which had been brought by the Defendants for alleged breaches.

The object of the Defendant was to shew that the Plaintiffs had been executing their works in such a way as intentionally to deprive the Defendant's company of benefits to which they were entitled under the contract.

The portion of the summons as to experts and other persons was abandoned.

Mr. *W. M. James*, Q.C., and Mr. *Smith Osler*, for the Defendant, in support of the summons.

THE VICE-CHANCELLOR said the accountant could not be admitted, as the accounts were in no degree complicated.

Mr. *James* and Mr. *Osler* said, that among the documents there

were a number of engineering maps and plans, the inspection of which by a solicitor would be practically useless. In the case of documents being produced in Hebrew, an interpreter would be permitted; and wherever special skill was required the same principle applied: *Mertens* v. *Haigh* (1), *Bonnardet* v. *Taylor* (2).

Mr. *Everitt*, for the Plaintiffs, cited *Groves* v. *Groves* (3), *Summerfield* v. *Pritchard* (4).

Mr. *James*, in reply:—

The object of the discovery is to see how the original plans were made, and whether alterations have not been made from time to time to suit the Plaintiffs' interests.

SIR W. PAGE WOOD, V.C.:—

I am inclined to think upon the whole that this is a case in which the Defendant's surveyor, or engineering agent, ought to see the plans, upon which the issue in the cause mainly depends. It is admitted that these documents are material to the issue, and the Defendant wishes to do that which every Defendant wishes to do, namely, to see whether the documents produced will prove his case. Suppose the issue had been a matter between foreigners, and documents had been produced in the Turkish language. The solicitor would say that the production was not of the least use to him unassisted. Here the Defendant, *Budd*, says and swears that he is not a person of any engineering knowledge, and that he should be quite unable to inspect plans and sections to any purpose without the aid and assistance of an engineer. It is quite possible that some of these plans which appear to shew one thing, may really show something very different, for the observation of which the experienced eye of an engineer may be necessary. It is not, I think, sufficient for the Plaintiffs to say the Defendants may have copies of all they want at their own expense. In the case of *Groves* v. *Groves* the person in whose possession the documents were was charged by the Plaintiff with forgery, and the question was whether the Plain-

(1) Joh. 735.
(2) 1 J. & H. 383.
(3) 2 W. R. 86.
(4) 17 Beav. 9.

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tiff's witnesses were, prior to their examination, to be allowed to look at these documents which the Plaintiff alleged to be forged. That is a very different question from that of the admission of a man to inspect documents which may be intelligible to his eye, though not intelligible to any one else. Mr. *Fisher* must therefore be permitted to attend and inspect, and Mr. *Jenkin* and his clerk, and no one else.

The costs of the summons will be costs in the cause.

Solicitors for the Applicant: Mr. *M. W. Hacon*, agent for Mr. *J. T. Jenkin, Swansea.*

Solicitors for the Plaintiffs: Messrs. *Wrentmore & Son*, agents for Messrs. *Coke, Jones, & Curtis, Neath.*

V.-C. W. 1866 *April* 21, 23, 25, 28.

In re JEAFFRESON'S TRUSTS.

Will—Personal Estate—Heirs of the Body—Trusts for education and payment at Twenty-one—Invalid Appointment—Surplus after Charge that failed.

Testator gave the residue of his estate, consisting wholly of personalty, to trustees, upon trust for *E. L.* for life, and after her decease, upon trust "for the benefit of the heirs of the body of *E. L.*, first, to educate at their discretion the said heirs, and lastly, to pay to the said heirs the said residue at their respective ages of twenty-one, in such proportions as *E. L.* might by deed grant, or by will direct":—

Held, upon the construction of the will, that the objects of the power were such of the statutory next of kin of *E. L.* as were descended from her.

E. L. by will appointed a legacy of £100, part of the fund, to a stranger to the power; and appointed the balance of the fund (after payment of legacies to objects of the power), which balance amounted to £260, to pay her own debts; and "should any surplus remain," she gave it to *E.*, who was one of the objects of the power:—

Held, that the £100 was unappointed, and did not pass to *E.*; but that the £260 was well appointed to *E.* freed from the charge of the debts, which failed as an invalid appointment.

ROBERT JEAFFRESON by his will, dated the 28th of October, 1806, gave all the rest, residue, and remainder of his estate (which consisted wholly of personalty) to trustees, upon trust to apply the same to the sole and separate use of his daughter, *Elizabeth Looby*,

wife of *Edward Looby*, of *Antigua*, during her natural life; and after her decease he gave the said residue and remainder of his estate to the said trustees, their executors, administrators, and assigns, "upon trust for the benefit of the heirs of the body lawfully begotten of his said daughter *Elizabeth Looby*, first, to educate at their discretion the said heirs, and lastly, to pay to the said heirs the said residue at their respective ages of twenty-one, in such proportions as his said daughter might by deed grant, or by will bequeath;" and he appointed the trustees his executors.

Testator died on the 25th of June, 1807.

His residuary estate was realised, and invested in £6860 0*s.* 6*d.* consols.

Elizabeth Looby by her will, dated the 20th day of May, 1861, bequeathed to trustees the said sum of £6860 0*s.* 6*d.* consols upon trust to sell the same and to pay and satisfy the legacies hereinafter mentioned. She bequeathed to her grandson *Jeaffreson Martin*, his heirs and assigns, the sum of £1450, part of the aforesaid stock of £6860 0*s.* 6*d.*; and she also gave and bequeathed to her granddaughter *Elizabeth Jeaffreson Martin*, her heirs and assigns, the sum of £1450, other part of the aforesaid stock; and she gave and bequeathed unto her friend *David Cranstown*, his heirs and assigns, the sum of £100, other part of the aforesaid stock. She desired that the dividends derived from the sum of £2000, other part of the said stock, should be applied by her said trustees to the maintenance and education of her two grandchildren, *Delos Jeaffreson Martin* and *Rebecca Pamela Martin*, during their respective minorities; and she bequeathed to her great grand-children, *Delos Jeaffreson Martin* and *Rebecca Pamela Martin*, each the sum of £1000, to be paid to them as soon as they respectively should attain twenty-one; and should they depart this life before that event, leaving issue, then the respective legacies were to be paid to the respective children of the said parents respectively in equal shares, and if but one child, to such only child; and in default of lawful issue, then to be paid to the respective heirs and assigns of the said *Delos Jeaffreson Martin* and *Rebecca Martin* respectively. She also desired that the annual interest or dividends to be derived from the sum of £1600, other

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part of the aforesaid stock of £6860 0*s.* 6*d.*, should be applied by her said trustees to the maintenance and education of her two other great grand-children, *Elizabeth* and *Octavia Martin*, during their respective minorities; and she thereby bequeathed unto her said great grand-children, *Elizabeth* and *Octavia Martin*, each the sum of £800, to be paid to them as soon as they should respectively attain the age of twenty-one years; and should they depart this life before that time, leaving lawful issue, then the respective legacies were to be paid to the respective children of the said parents respectively in equal shares; but if but one child, then to such only child, and in default of lawful issue, then to be paid to the respective heirs and assigns of the said *Elizabeth* and *Octavia Martin* respectively. And the testatrix desired that the balance of the said stock, amounting to £260 0*s.* 6*d.*, might be appropriated by her said trustees in the payment of her funeral expenses, just debts, and the costs and charges consequent on the execution of her said will; in the sales and transfer of stock as aforesaid; and all other matters connected therewith; and should any surplus remain after all legal disbursements as aforesaid, she gave the same to her grand-daughter *Elizabeth Jeaffreson Martin.*

Mrs. *Looby* died on the 16th of July, 1863. She had had three children, daughters, all of whom died in her lifetime. One child died unmarried, having attained twenty-one. The second, *Eliza Stanley*, had three children, all of whom died without issue in Mrs. *Looby's* lifetime, one having attained twenty-one. The third, *Sarah Entwistle Martin*, had had eight children, of whom four died without issue in Mrs. *Looby's* lifetime, one having attained twenty-one. Of the remaining four, *Edward* died in 1861, having had three children, of whom two, *Delos Jeaffreson Martin* (the heir-at-law of Mrs. *Looby*) and *Rebecca Pamela Martin*, were now living; *Elizabeth Jeaffreson* married *O. A. Harney*, and was still living; *Henry Josiah* died in 1861, leaving two children, *Eliza Louisa Looby Martin* and *Octavia Entwistle Martin*, who were now living; and *Jeaffreson Martin* was still living, having one child living.

The question raised upon two Petitions was, what class of persons were objects of the power of appointment in *Robert Jeaffreson's* will.

Mr. *Daniel, Q.C.*, and Mr. *G. W. Lawrance*, for one set of Petitioners (Messrs. *Gurney* and others), the assignees of the interest of *Jeaffreson Martin*:—

"Heirs of the body," here mean such of Mrs. *Looby's* next of kin as might be her descendants. That is the only construction that will satisfy the words; *Gittings* v. *McDermott* (1); *Pattenden* v. *Hobson* (2); *Doody* v. *Higgins* (3).

Mr. *T. C. Renshaw*, for the two children of *Henry*:—

Either the gift is an absolute interest; *Elton* v. *Eason* (4); or the expression "heirs of the body" means children; *Price* v. *Lockley* (5); *Bull* v. *Comberbach* (6).

Mr. *Rolt, Q.C.*, and Mr. *Druce*, for Mrs. *Harney*, who, with her husband, were Petitioners in the second Petition:—

The words cannot mean heir as *persona designata*; they may mean "issue" at large; or they may convey an absolute interest: *Williams* v. *Lewis* (7); *Jesson* v. *Wright* (8).

Mr. *Macnaghten*, for *Delos J. Martin*, the heir-at-law:—

The words must be construed strictly. The heir-at-law, being "heir of the body," is entitled to the whole; *De Beauvoir* v. *De Beauvoir* (9); *Hamilton* v. *Mills* (10).

Mr. *Daniel*, in reply.

SIR W. PAGE WOOD, V.C.:—

The question for decision here turns upon the construction of one very short clause in the will of *Robert Jeaffreson*. [His Honour read the clause.]

Mrs. *Looby* appears to have made some disposition which did not exhaust the whole fund; and the question is, who are the objects of this gift. Upon that several constructions have been suggested.

(1) 2 My. & K. 69.
(2) 17 Jur. 406.
(3) 2 K. & J. 729.
(4) 19 Ves. 73.
(5) 6 Beav. 180.
(6) 25 Beav. 540.
(7) 6 H. L. C. 1013.
(8) 2 Bli. 1.
(9) 3 H. L. C. 524.
(10) 29 Beav. 193.

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First, it was contended upon the authority of *Elton* v. *Eason* (1), before *Sir W. Grant*, and of *Williams* v. *Lewis* (2), that *Elizabeth Looby* took an absolute interest; the words being such as it is said would have given her an estate tail in realty.

Next, it was argued on the authority of *De Beauvoir* v. *De Beauvoir* (3) that by "heir of the body" was meant "heir," and that the heir-at-law takes as *persona designata*.

The third construction which has been suggested is, that according to the decision in *Pattenden* v. *Hobson* (4) the persons intended were such of the next of kin of *Elizabeth Looby* as might be her descendants. These were the three substantial constructions that were argued for, though some others were suggested.

Now first, as to the gift being an absolute interest in Mrs. *Looby*. I think it is clear on the words of the will that it is not. I do not desire to question any of those decisions in which, where the will clearly and distinctly creates an estate tail in realty on the whole will, the Court has held that words which are intended to create an estate tail in realty will be taken to give an absolute interest in personalty; that being the only mode in which personalty can be dealt with in order to make the interest in it analogous to an estate tail. Upon this point I will simply recall the observations of the Lord Chancellor in *Ex parte Wynch* (5) which I think are very pertinent to the present case. But I think upon such a gift of personal estate as this, the question is —not whether the construction of the clause, taken simply word by word, would give an estate tail—but whether, regard being had to the whole will, considering that the property is personal and not real estate, there is an intention manifested that "heirs of the body" should be used in its proper sense. The proposition cannot be taken absolutely in its full integrity, that every form of expression which will create an estate tail in realty will give an absolute estate in personalty, which would contradict the rule established in *Forth* v. *Chapman* (6). And without pausing to consider whether the set of words used here would bring this case within the rule in *Shelley's Case*, regard being had to the decision of the

(1) 19 Ves. 73.
(2) 6 H. L. C. 1013.
(3) 3 H. L. C. 524.
(4) 17 Jur. 406.
(5) 5 D. M. & G. 188, 207.
(6) 1 P. Wms. 663.

House of Lords in *Jesson* v. *Wright* (1), I think the use of words like these, when accompanied with a discretionary power of education for these heirs of the body, and with an express discretion for division at twenty-one—justifies me in saying that the testator did not point to heirs *successivè*, who are to continue proprietors of the fund in question to an extent which the law would not allow, and which the law would cut short by giving the fund to the first taker; but rather to a set of persons, heirs of the body of *Elizabeth Looby*, who are a co-existing body, and not persons taking in succession. Now, although "heirs of the body" is not so flexible a term as "issue," that it does not invariably create an estate tail is evident from the authorities which have been cited, and which are distinguished in the House of Lords from the case of *Williams* v. *Lewis* (2), namely, the two cases of *Hodsel* v. *Bussy* and of *Sands* v. *Dixwell*, both before Lord *Hardwicke*, which were cited in *Garth* v. *Baldwin* (3). In the later case of *Sands* v. *Dixwell* the words were in this form. Freeholds and leaseholds were devised in trust to convey to the separate use of testator's daughter for life, without the intermeddling of her husband, and after her decease in trust "to the heirs of her body." There Lord *Hardwicke* held that the heirs of the body took by purchase; and that words which, when applied to realty according to the rule in *Shelley's* case, clearly created an estate tail, inasmuch as both the interests were equitable, did not give an absolute estate in personalty.

To this may be added the case before Vice-Chancellor *Shadwell*, of *Symers* v. *Jobson* (4), in which, upon the whole will, that learned Judge came to the conclusion that by "heirs of the body" was meant "children;" because he thought that by other gifts and bequests the testator indicated that the children of his daughters were the persons who were intended to take.

With respect to the rule in *De Beauvoir* v. *De Beauvoir* (5), that the "heir of the body" takes *quâ* heir, as the person designated, the same reason applies exactly, namely, that the gift is not made to the heir in the transmissive capacity, or by representation from the mother, in which case the mother would

(1) 2 Bli. 1. (2) 6 H. L. C. 1013, 1022. (3) 2 Ves. sen. 646.
(4) 16 Sim. 267. (5) 3 H. L. C. 524.

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herself take immediately the whole interest. The words here, as I consider, indicate not transmissive interests to the heirs, but the interests of a set of persons co-existing, who are designated by this term, however improperly.

I come then to the decision of Vice-Chancellor *Kindersley* in *Pattenden* v. *Hobson* (1), which appears to me to be the correct view of such a set of words as we have brought together here. If they do not create an estate tail, and the heir of the body does not take as purchaser, we are then driven to look at the meaning of the words "heirs of the body" as applied to personal estate. Now, in a variety of cases (supposing the doctrine in *De Beauvoir* v. *De Beauvoir* to have been got rid of), the expression has been held to mean those who would take the property as representing the *propositus*—not, indeed, as I had occasion to observe in *Re Porter's Trust* (2), in the strict and literal sense, for then the persons so taking would be the executors or administrators of the *propositus*; but those who take the beneficial interest by virtue of the *Statute of Distributions*. I think that disposes of the criticism of Mr. *Druce*, who said that the difficulty of holding that the expression means a limited class, namely, those next of kin who were descended from the *propositus*, to the exclusion, it might be, of the grandmother, or other next of kin who were not descendants was this: that you first lay hold of the word "heirs," as meaning those who represent the person, and then you exclude some one of that class from so representing. But it does not seem to me to be at all illogical to do that. The testatrix may be supposed to have known that there were a certain number of persons who, if she died, would take as her heirs, and from those she may have selected a limited class, namely, those heirs who take by representation, and who also combine the quality of being descended from her.

The declaration must be, that the persons entitled to the benefit of the bequest of the testator's residuary estate after the death of *Elizabeth Looby*, were the next of kin of *Elizabeth Looby* living at her decease, and descended from her, subject to the power of appointment amongst such next of kin contained in the testator's will. Then a declaration that, in the events which have happened, the particular persons are entitled; and from the direction to pay

(1) 17 Jur. 406. (2) 4 K. & J. 188, 197.

to them at twenty-one, it appears that they take as tenants in common.

April 28. The case was mentioned again to-day on minutes, on the following point:—

It was admitted that the legacy of £100 to *David Cranstown*, who was a stranger to the power, was invalid; also that the charge upon the £260 0*s.* 6*d.*, balance of the stock, for payment of debts, was invalid; and the questions were, whether or not *Elizabeth Jeaffreson Martin*, now Mrs. *Harney*, was entitled to the £100; and whether she was entitled to the sum of stock freed or not from the charge of debts.

Mr. *Druce*, for Mrs. *Harney*:—

The £100 and the charge of debts are badly appointed, and pass under the residuary bequest, which is a good appointment to Mrs. *Harney*, one of the objects of the power. The intention was to give to the granddaughter whatever might not be effectually disposed of under the appointment.

Mr. *Renshaw*, for two infant next of kin, descendants:—

The ultimate balance in this case is undisposed of, and goes to all the objects of the power. What the testatrix purports to give to her granddaughter is not a general residue, but a surplus. It is a specific bequest, and cannot carry a lapsed interest: *Green* v. *Pertwee* (1).

The VICE-CHANCELLOR:—The question that generally arises is, whether the gift is a charge upon the fund, or a disposition of part of the fund, like *Page* v. *Leapingwell* (2). In this case it seems as though the residue of the sum of stock were given subject to the charge; and if so, the charge vanishes, and the gift remains.

Mr. *Renshaw*, cited *Easum* v. *Appleford* (3).

The VICE-CHANCELLOR observed that that case was an authority to shew that Mrs. *Harney* could not claim the £100.

(1) 5 Hare, 249. (2) 18 Ves. 463. (3) 5 My. & Cr. 56.

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Mr. *Renshaw* said that not only was the £100 unappointed, but the rest of the sum of stock being appointed badly, namely, to pay debts, was equally unappointed, and did not pass by the gift of surplus.

Mr. *Druce* claimed the £100 as being a charge, which, like the charge of debts, failed, and fell into the sum of stock.

SIR W. PAGE WOOD, V.C.:—

I think the two cases are distinguishable. If it be ascertained that Mrs. *Looby* was allotting out her money in shares, and then that, in order to describe Mrs. *Harney's* share, instead of mentioning the actual sum "£260," she used the expression "the residue of the sum of stock," Mrs. *Harney* can take only the residue, amounting to £260, and not the £100. But as to the £260, that is given charged with a disposition which is invalid. The charge drops, but the gift remains; therefore, Mrs. *Harney* takes that fund.

The declaration will be that the £100 was unappointed; with consequential directions.

Solicitors for the first Petitioners: Messrs. *Lawrance, Plews, & Boyer.*

Solicitors for the second Petitioners, and some of the Respondents: Messrs. *Uptons, Johnson, & Upton.*

Solicitor for other Respondents: Mr. *William Day.*

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GASKIN *v.* ROGERS.

Will—Annuitant, whether a Legatee—Erasure of Explanation—Direction as to Marshalling—Attestation by Legatee of Codicil cancelling a Condition attached to his Legacy.

Testator bequeathed several life annuities and legacies of sums of money and stock to persons, and legacies of sums of stock to charities, and directed his residue, after payment of debts, life annuities, and the pecuniary legacies thereinbefore given, to be accumulated during a term of two years or two lives in being, whichsoever should be the larger term, and then to be divided

amongst the several persons taking pecuniary legacies (under which denomination legacies of stock were intended to be included), under his will or any codicil thereto, rateably and in proportion to the amount in value of their respective original legacies, the legacies of stock being for that purpose estimated at par.

Testator also directed that inasmuch as certain parts of the proceeds of his estate might be of such a nature as not to be legally applicable to answer and satisfy bequests to charities, the assets should be marshalled, so that such of the legacies thereby bequeathed as were given to charities might be paid exclusively out of the funds legally so applicable.

In the original will was a clause whereby annuitants were excluded from participation, and also representatives of legatees who might die before the period of distribution. By a codicil in the margin of the will this passage was struck through with a pen, and the cancellation attested in the ordinary testamentary form, one of the witnesses being a legatee who happened to die before the period of distribution:—

Held, that whilst the established rule of law declares that, in the absence of evidence of intention to the contrary, "legacies" include annuities; yet here there was sufficient evidence of the testator's intention to exclude annuitants, and that the cancellation of the explanatory clause, whilst it restored the original ambiguity, did not point to any alteration of intention, or admit (in this instance) the operation of the ordinary legal rule:

Held, further, that the direction as to marshalling in favour of charities, extended to the gifts of residue as well as to the original legacies:

Held, further, that the representatives of the legatee who attested the cancellation, and died before the period of distribution, were excluded from participation, under the 15th section of the *Wills Act* (1 Vict. c. 26).

GEORGE HENRY MALME by his will, dated the 24th of January, 1861, after making some specific bequests, bequeathed several life annuities and legacies of sums of money and stock to persons, besides legacies of sums of stock to charities.

Amongst other persons, he gave to *Joseph Samuel Joyner* a sum of £100 consols and an annuity of £20 for his life.

He also gave a legacy to his late servant, *Anne Stephenson, but the said Anne Stephenson was not in respect of that legacy to be a participator in the distribution of his residuary estate under the provisions thereinafter contained.* He also gave to another late servant a sum of £50, *but without any right in respect thereof to participate in the distribution of his residuary estate.*

He devised and bequeathed all the residue of his estate, real and personal, to trustees (whom he also appointed his executors) upon trust to sell and convert and to stand possessed of the proceeds upon trusts which he declared as follows: "Out of the

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moneys which shall arise from such sale, collection, and conversion, in the first place to pay all my just debts, funeral and testamentary expenses, and the life annuities hereby given as the same shall become due, and in the next place pay the several pecuniary legacies hereinbefore given, and purchase or appropriate a sufficient sum in Consolidated, Reduced, or New £3 per Cent. Annuities, but not in any other kind of investment whatsoever, in the names of the said trustees or trustee, to answer and pay the said life annuities, and after making such payments and appropriation as aforesaid, the said trustees or trustee shall hold all moneys arising from the sale, collection, and conversion of my said residuary estate, upon trust to invest the same in the purchase of Government £3 per Cent. Annuities, in the names or name of the said trustees or trustee, but not in any other kind of investment whatsoever, and subject and without prejudice to anything hereinbefore expressed, the trustees or trustee shall stand possessed of my residuary estate, and the income arising therefrom, upon trust to lay out and invest the income for the time being arising therefrom in the purchase of like annuities, so as to improve, augment, and accumulate the same by way of compound interest during the term of two years after my death, or during the continuance of the annuities hereinbefore given by me to my said sister and brother-in-law respectively, whichsoever shall be the larger term or period of the two, and after the expiration of the said term of two years and the determination of my said sister and brother-in-law's annuities respectively, but not before that time, the said accumulated fund, comprising the entire residue of my said estate, subject to such appropriations and provisions as the executors of my will may deem it necessary to make as to annuities then subsisting, if any, or for any other purpose or purposes hereby authorized, and including all such appropriations when the purpose of the appropriations shall cease, shall be divided amongst and paid to *the several persons*, including the executors of my will herein named and charitable institutions *taking pecuniary legacies*, under which denomination legacies of government stock or funds are intended to be included, of the amount or value of £50 each or upwards under this my will, or any codicil I may hereafter make to the same, including servants

entitled to legacies of accumulative nature depending upon length of service, in cases wherein the accumulated amount or value at the time of my death shall be or exceed £50, but excluding persons taking legacies as to which express provision has been or shall be made by me to the contrary, *rateably and in proportion to the amount or value of their respective original legacies;* the legacies in £3 per Cent. Annuities being for that purpose estimated and valued at par without regard to the actual market price or value thereof."

Following this passage in the will as originally engrossed, was the following:—

"But it is my will that in the distribution of my residuary estate annuitants for life or lives shall not, in respect of their respective annuities, or the value thereof, be entitled to participate in such distribution; and, also, that the representatives of a legatee or legatees who may happen to die prior to the time appointed for the ultimate distribution of my residuary estates, as well as all other persons entitled, or claiming through or under any such deceased legatee or legatees, shall also, as such, be excluded from participation in my said residuary estate."

This passage, as appeared from the probate, had been struck through with a pen, and the following memorandum, or codicil, inserted in the margin:—

"I, the within-named testator, *George Henry Malme,* do hereby declare that I have cancelled, and do hereby make null and void, the words and lines, &c." [describing the obliterated passage], "to the end and intent that my said will may be read, construed, and have effect to all intents and purposes as if the matters so cancelled had never been inserted therein. In witness whereof I hereunto sign my name, the 12th day of August, in the year of our Lord, 1861.

"*George H^y. Malme.*

"The foregoing declaration was signed by the above-named testator, *George Henry Malme,* in the presence of us, both present at the same time, who, in testimony thereof and at his request,

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hereto subscribe our names, in his presence and in the presence of each other.

"*Josh. Saml. Joyner,*
"*James Geo. Joyner.*"

The will then, after various other provisions, contained a direction by the testator that all legacy and succession duty which should become payable *in respect of the annuities and other legacies,* bequests, and dispositions thereby made, should be paid out of his residuary estate in exoneration of the legatees and devisees respectively.

Testator also directed as follows: "Inasmuch as certain parts of the proceeds of my estate may be of such a nature as not to be legally applicable to answer and satisfy bequests to charitable institutions, the assets shall be marshalled so that such of the legacies hereby bequeathed as are given to charities may be paid exclusively out of the funds legally so applicable."

The testator made two codicils, dated respectively the 25th of April and the 7th of August, 1861; and the will and codicils were duly proved on the 13th of December, 1861.

The main question was, whether annuitants were, or were not, entitled to participate in the residuary personalty.

A second question arose in the following way. *Joseph Samuel Joyner* survived the testator, but died on the 14th of July, 1862, before the period of distribution arrived. The question was, whether, in consequence of his attestation of the cancellation of the passage whereby representatives of legatees dying before the arrival of the period of distribution were excluded, his representatives were excluded, under the 15th section of the *Wills Act,* from participation in the residue.

Mr. *G. M. Giffard,* Q.C., and Mr. *Cottrell,* for the Plaintiff, a pecuniary legatee:—

The trust for accumulation for two years, or during the lives of testator's sister and brother-in-law, whichever should be the larger term, renders it improbable that he intended his brother and sister-in-law to participate. The testator himself has defined who are the persons whom he describes as persons "taking pecuniary

legacies," namely, legatees of stock, as well as legatees of money. He does not include annuitants in the definition.

Assuming the will, as it stands, without the obliterated portion, to shew that annuitants were not to participate, can it be contended that this obliteration is to alter the effect of the will, when the testator himself says the will is to be read and construed, and have effect, to all intents and purposes, as if the matters so cancelled had never been inserted therein? The Court will look at the will only, not at the cancelled portion of it.

With respect to the legacy to *J. S. Joyner*, if the cancelled portion had stood, his representatives would have been excluded. The cancellation lets them in; but *Joyner* was a witness to the cancellation, hence the legacy is null and void (1 Vict. c. 26, s. 15).

The cases in which "legacies" have been held to include annuities are those in which legacies have been made a charge upon real estate. Here the expression is not "taking legacies," but "taking pecuniary legacies."

[They cited *Nannock* v. *Horton* (1); *Cornfield* v. *Wyndham* (2).]

Mr. *Rolt*, Q.C., and Mr. *Speed*, for the executors of the will:—

In *Bromley* v. *Wright* (3) V.C. *Wigram* says it is an established proposition in cases of this kind that annuities are legacies, unless the context of the will shows that such was not the intention of the testator.

Mr. *Amphlett*, Q.C., and Mr. *Dickinson*, for a tenant for life of a legacy, and her children, referred to *Todd* v. *Bielby* (4).

Mr. *Daniel*, Q.C., for a pecuniary legatee.

Mr. *Rodwell*, for another legatee, cited *Hardacre* v. *Nash* (5).

Mr. *H. F. Bristowe*, for the charitable legatees:—

The direction as to marshalling applies not only to the legacies originally given to charities, but extends to the shares of residue given to the charitable legatees.

(1) 7 Ves. 391.
(2) 2 Coll. 184.
(3) 7 Hare, 334, 340.
(4) 27 Beav. 353.
(5) 5 T. R. 716.

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Mr. *Osborne*, Q.C., and Mr. *Boys*, for the executrix of *Joseph Samuel Joyner* (who was an annuitant as well as a legatee) :—

It has been held by V.C. *Kindersley* that the attestation of the execution of a codicil by a legatee under the will does not render the legacy void: *Gurney* v. *Gurney* (1).

[On the question of annuities being included within the description of "legacies," they mentioned *Heath* v. *Weston* (2); *Sibley* v. *Perry* (3).]

Mr. *V. Hawkins*, for the representative of a sister of the testator, who was his heir at law and next of kin, and also an annuitant under his will :—

The common case of both parties is, that the testator originally meant to exclude the annuitants. If the obliterated passage had been allowed to remain there would have been no doubt.

But he cancelled this passage, and the question is, what was his intention in so doing? It cannot be that he took all this trouble to remove a mere superfluous piece of explanation; it must be that, having altered his mind as to the annuitants, he resolved to let them in, and supposed that by this means he had accomplished his object.

It may be that he did not perfectly do what he intended, and left the matter in some degree of ambiguity. But even in such a case as that, the rule of law, as expressed in *Bromley* v. *Wright*, must prevail, a rule which was followed in *Ward* v. *Grey* (4), and in *Mullins* v. *Smith* (5).

The direction to marshal extends only to the original legacies, not to the gifts of residue. The case has been argued as if the legacies to charities were demonstrative legacies. They were simply stock legacies. The gifts of residue are not, strictly speaking, legacies at all. They are gifts of an actual fund, consisting in part of real assets. No marshalling, therefore, can take place, but to the extent so much of the fund as is not pure personalty, the gifts to charities must fail.

(1) 3 Drew. 208.
(2) 3 D. M. & G. 601.
(3) 7 Ves. 522.
(4) 26 Beav. 485.
(5) 1 Dr. & Sm. 204.

SIR W. PAGE WOOD, V.C.:—

Upon the construction of this will and codicil I think that the annuitants are not entitled to any proportion of the residue. The case has been extremely well argued on all sides, but I do not think that any of the cases contained in the valuable repertory of Mr. *Hawkins* would help one very much beyond the general principle laid down in *Bromley* v. *Wright* (1), which I apprehend now to be the true principle of construction, namely, that if you find simply the word "legacy" used, and a direction to apportion the property amongst the legatees, unless there be something apparent on the face of the will which shows that the testator has not used the word in its ordinary legal signification, it will include annuitants. The expression "pecuniary legatees" in itself, I do not think, would go further than this—it would exclude specific legatees, that is, legatees of mere chattels, but it would have no effect in excluding, *primâ facie*, annuitants from taking the same benefit as they would have taken if the word had been "legatees" instead of "pecuniary legatees." All these rules of construction are open to the general and cardinal principle of considering what you can collect from the testator's whole will, as to words which themselves are not of such clear and definite import as certain other words which have their established and fixed meaning in law. If I take the whole will, irrespective of the passage destroyed by the codicil, and as if that passage had never had any existence, I confess I think that there is enough on the face of this will to remove the ambiguity.

[His Honour proceeded to discuss the scheme of the will, observing that in the passage directing payment out of residue of the several pecuniary legacies thereinbefore given, the testator had with his own hand drawn a complete distinction between "life annuities" and "pecuniary legacies before given," a distinction which would be found to have been preserved throughout; also that the testator had used the words "pecuniary legacies" in their popular sense, a sense in which it had been used, not indeed by the Judge, but by the reporter in the marginal note of *Bromley* v. *Wright*, as meaning legacies in contradistinction to annuities;

(1) 7 Hare 334.

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further, that the testator, finding he had used the word "pecuniary" in a way which was ambiguous, had explained it as comprising legacies of stock as well as of money; and as if to prevent inconvenience and embarrassment as to how the stock legacies should be estimated for the purpose of dividing the residue, had declared that they should be taken at par, whilst he had made no provision whatever for the valuation of annuities which were much more difficult to value. His Honour then continued:—]

Let us now introduce the clause which has been struck out, and read the whole will as it originally stood. We find the testator having given his directions as to stock, adding these words. [His Honour read the obliterated passage.]

Now when one comes to that clause, I suppose the strongest way in which the argument can be put is the way in which it was put by Mr. *Hawkins*, which was this:—We have not here a question of doubtful expression in the will. The expression is the same as if the testator had said: "I direct my residuary estate to be disposed of among all persons taking any benefit under my will, according to the amount of their benefit respectively, *except annuitants*." If the will had stood in that way, and then there had been a codicil of this description striking out the exception, no doubt the striking out of the exception would have amounted to a gift, and would have given the annuitants the benefit of partaking under the title of "persons entitled to take any benefit under my will."

But the expression is not that, nor does it come up to anything like that. The expression seems to me to be one of an ambiguous nature; and when the Court meets with such an expression, it must follow that construction which the words will, according to the rules of the Court, *primâ facie* bear; and the *onus* is thrown upon those who contend for a different construction to shew, first that the words are flexible and capable of being moulded at all, and then, from some other portion of the will, that the intention requires them to be so differently construed.

In the case of *Bromley* v. *Wright*, Vice-Chancellor *Wigram* held himself bound by law to consider annuities as legacies, unless the context of the will shewed that such was not the intention of the testator.

In the present case, supposing I am dealing with the whole will, including this clause, what does it tell me? It says this. The testator has used words which might be ambiguous if there were nothing appearing to explain them; but he has inserted in his will something that does explain them. He says "there are two ways of construing the words I have used, and the meaning is not that I intend to except a class out of a gift I have made, but that I never had any intention of including that class at all. Then he cancels that clause, and I am thereupon asked to read that cancellation as evidence of an intention to give to those to whom he actually did not intend to give, by the very same words which still remain in the will. It is the same as if he had said, knowing the words to be doubtful: "I will strike out the clause which will clear away the doubt, and I will leave the doubtful words to be interpreted by the Court in the way in which the Court interprets such words when an ambiguity is left upon the whole will."

Now it would have been the simplest thing in the world if, instead of striking out this clause by a cancellation which has cost the testator the trouble of having two witnesses, he had made a codicil which would have removed all this doubt. By a codicil he might have said: "I did not intend to make this gift by my will, but I now give to the annuitants a share equal to the other persons who are to participate in my will."

It is not, therefore, as if the testator had made clear and complete bequests, in plain and unambiguous language, to all his legatees except annuitants, and then had struck out the exception; but it is this, as it appears to me, that he has used words which the Court might decide to mean one thing or the other, and which, by his explanation, he has clearly told the Court are only to be taken in one way. It seems to me to be a monstrous construction of these words, to hold that there is any intention by striking out the explanatory clause to make a gift to persons to whom he did not intend to give by his will.

I have thought it right to give my decision upon both points; but, even upon the first ground, I hold that there was not that ambiguity which the testator might think would arise, and might therefore take care to guard against. But if it did arise, the

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ambiguity was cleared away entirely by the form of language he has used, by which he himself, as his own interpreter, has very clearly, throughout the whole clause which contains the gift, separated two classes of persons, and, having so separated them, has taken the case out of the general rule of construction by which the words "pecuniary legatees" might have been held sufficient to include the several annuitants. I think, therefore, I must hold that they do not take.

As to the question of marshalling, it has been put very ingeniously by Mr. *Hawkins*, but, I think, more ingeniously than solidly. Holding, as I now do, that the testator has given to these charitable legatees a proportion of his residuary estate, equivalent to the proportion that their original legacy bears to the whole amount of the legacies, it comes to the same as if he had given a legacy of £2,000 to *A.* and a legacy of £1,000 to *B.*, and had then said: "Divide my residuary estate into corresponding shares; when you have ascertained the residue, I give two-thirds of it to *A.*, and one-third to *B.*" Then he remembers that *B.* is a charity, and he says: "Inasmuch as certain parts of the proceeds of my estate may be of such a nature as not to be legally applicable to answer and satisfy *bequests*" (not legacies) "to charitable institutions, the assets shall be marshalled." He is anxious, therefore, that these bequests to charitable institutions shall be satisfied. He speaks of the assets being marshalled, "so that such of the legacies hereby bequeathed as are given to charities may be paid exclusively out of the funds legally so applicable." Now the bequest of a third of a man's residuary estate is a legacy to all intents and purposes. Is it the less a legacy because he says, I give to one person £2,000, to another person £1,000, and I give my residue in exactly the same proportions? It is a gift, as it appears to me, of a legacy, and then he says: "Now marshal it according to the respective legacies." I think, therefore, so far as that goes, the direction to marshal will apply. But then Mr. *Hawkins* says, and that is the most ingenious part of the argument, the gift of the residue fails, because what is given to charities is property consisting of leaseholds, mortgages, and other things of that description, which savour of the realty, and hence the gift of the residue is, *pro tanto*, a void gift. Suppose, then, that

a man has a £2000 mortgage, and £1000 invested in the funds, and that he gives his residuary estate, consisting of £3000, as to £2000 to A., and as to £1000 to B. There would be a gift to A. and B. of the whole fund; but divisible in these proportions. That will determine the amount of the legacies; then as to their quality, as to what the legatees are to take, he says it shall be so marshalled that both shall have effect. In the one case, the legatee who is not a charity can claim either fund, he can take it either out of the mortgage or out of the personal estate. The testator says: "You shall not take it out of the stock, you must take your value out of the mortgage." That is marshalling in every sense of the word; and it appears to me the direction as to marshalling will apply to the gift of the residue.

As to the legatee, *Joseph Samuel Joyner*, who died before the period of distribution, I think it is quite clear his representatives must be excluded, and that the case before Vice-Chancellor *Kindersley* has no application. If I may be allowed to say so, I entirely agree with the reasoning of the Vice-Chancellor *Kindersley* in *Gurney* v. *Gurney* (1).

In this case, in the events that happened, *Joseph Samuel Joyner* originally had no gift at all out of the residue; he could only receive the gift personally on his surviving the period of distribution; and if the testator had died immediately after the execution of the original will, he would have been in possession of nothing. But then there comes in a codicil which makes an absolute gift to him by taking away the condition: it makes him a positive, distinct, and clear gift. It was only given conditionally before: now the testator says I make you a gift which is absolute and unconditional. That share of the residue therefore lapses, and must go to the representative of the next of kin and heir-at-law.

MINUTES:—"Declare that according to the true construction of the testator's will and codicils, the residuary estate became apportionable amongst the several legatees taking legacies in money or stock to the amount of £50 respectively, or upwards, such stock being calculated at par, but excluding the persons entitled to annuities under the will from any participation in the residue in respect of the value of such annuities.

(1) 3 Drew. 208.

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"Declare that *Joseph Samuel Joyner*, not having survived the period of distribution, is also excluded from any participation in the testator's residuary estate, notwithstanding that the clause to that effect originally contained in the testator's will was cancelled by the codicil of the 12th of August, 1861; inasmuch as the said *Joseph Samuel Joyner* was an attesting witness to such codicil, and is thereby deprived of the interest which would have otherwise been given to him by the cancellation of the said clause.

"Declare that the share which *Joseph Samuel Joyner* would otherwise have taken in respect of his said legacy in the testator's residuary real and personal estate, has lapsed, and that the testator's heir-at-law is entitled to so much thereof, or the proceeds thereof, as consisted of real estate, and the next of kin to so much as consisted of personal estate.

"Declare that the residuary estate is to be marshalled in favour of the charitable institutions taking shares therein.

"Reserve further consideration."

Solicitor for the Plaintiff: Mr. *E. S. Stephenson.*

Solicitors for the Defendants: Messrs. *J. & C. Rogers;* Messrs. *Uptons, Johnson, & Upton;* Messrs. *Foster & Anderson;* Messrs. *Boys & Tweedies.*

V.-C. W.
1866
March 13.

5 Ch 462

MORGAN v. FULLER (1).

Practice—Patent—Pleading—Amending Issues.

A Defendant will not be allowed to add a totally new issue of fact not in any way suggested by his answer to the issues which have been already directed for trial.

Semble, that in order to raise such new issue the Defendant must file a supplemental answer.

THIS was a motion upon a summons adjourned from Chambers for liberty to add further issues of fact to those already directed for trial by the Court.

The bill was filed to restrain the infringement of a patent. The Defendants by their answer disputed the validity of the patent on the ground of want of novelty. Replication had been filed, and on the 18th of January, 1866, an order was made for trial before the Court without a jury of the following issues:—

1. Whether Plaintiff was true and first inventor. 2. Novelty of the invention at the date of the patent. 3. Utility of the invention. 4. Sufficiency of specification. 5. Infringement.

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The Defendants now sought to add the following further issues of fact to those already directed, viz.:—

(a) Whether the Plaintiff had at the date of the letters patent invented the whole invention described in the complete specification; and (b). Whether the invention as described in the provisional specification on which the letters patent were issued covered the whole of the invention as ascertained by the complete specification.

Mr. *Fooks*, in support of the application, which had been adjourned from Chambers into Court, contended that the Defendants ought not to be shut out from bringing this case fully before the Court, and that it was perfectly competent for the Court to make the order.

Mr. *W. Pearson, contrâ*, was stopped.

SIR W. PAGE WOOD, V.-C.:—

This application is not a mere matter of form, but is an attempt to raise a totally new issue of fact which is not in any way suggested by the answer, and should have been raised by a supplemental answer. I am not justified in directing an issue not raised upon the pleadings now to be raised, and if I were to do so I should be exceeding that control which the Court possesses over its own general orders. The application must be refused with costs.

Solicitors for the Plaintiff: Messrs. *Bicknell & Bicknell.*
Solicitor for the Defendants: Mr. *G. F. Cooke.*

MORGAN *v.* FULLER (2).

V.-C. W.
1866
April 28.

Patent—Particulars of Objections—Insufficiency of Particulars.

In a suit to restrain the infringement of a patent for improvements in the construction of carriages, the alleged invention consisting of a particular mode of opening and closing the heads of carriages, particulars of objections stating that head-joints similar to those used in the Plaintiff's alleged invention had been, before the date of the patent, commonly used *by carriage*

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builders generally throughout Great Britain, and that head joints, similar to those described in the specification, had been actuated in their motions in the way described, before the date of the patent, *by various carriage builders in or near London, Liverpool, Manchester, and Southampton, and various other of the principal towns of Great Britain*, were held insufficient.

Semble, that where the objection points to the public use of a particular preparation, the words "by various makers in or near *London*," might be sufficient.

Semble, also, if the Defendant could not give the names of the carriage builders *in or near London, &c.*, he would be required to specify the class or classes of carriages with respect to which the alleged prior user had taken place; and that might have been held sufficient.

THIS was a summons by the Plaintiff, adjourned from Chambers, that the Defendants might deliver further and better particulars of objections, by stating the names and addresses of the persons by whom, and the places where, and the dates at, and the manner in which, the invention was alleged by the Defendants to have been used before the date of the Plaintiff's patent, and by stating also what parts of the combination were alleged by the Defendants not to have been invented by the Plaintiff; and, in default, that the Defendants be precluded from giving any evidence at the trial of the issues of which proper notice should not have been given in the particulars of objections; and that the 5th and 6th objections be struck out.

The patent was for improvements in carriages, the peculiarity of the invention being, that the apparatus for opening and closing the heads of carriages could be worked by a coachman or person sitting on the driving seat, or by a person sitting behind the carriage.

The objections, so far as material, were as follows:—

1. That head-joints for opening and closing heads of carriages, similar to the head-joints used and applied in Plaintiff's alleged invention, had been commonly used and applied for the same purpose *by carriage builders generally throughout Great Britain*, long before the date of the said letters patent.

2. That head-joints so used and applied, had been concealed in the lining of the carriages in which they were used and applied *by carriage builders generally*, long before, &c.

3. That head-joints, &c., similar in form and action to those described in the Plaintiff's specification, had been actuated in their motions by lever handles and connecting-rods, before the

date of the said letters patent, in carriages fitted up or constructed *by various carriage builders in or near London, in or near Liverpool, in or near Manchester, in or near Southampton*, and *in or near various other of the principal towns of Great Britain*, where the carriage building trade had been carried on, and amongst other carriage builders by Messrs. *Thorn*, of *Great Portland Street, London.*

4. That the mode described in the complete specification of the Plaintiff's invention of combining with the heads of carriages the mechanical parts described in the said specification, and to which (separately), the Plaintiff professed to make no claim, had been in its essential features applied and used before the date of the said letters patent in *various* mechanical combinations and contrivances, applied to *various* matters and purposes, including, amongst others, the construction of breaks to railway carriages and carriages on ordinary roads, the construction of telegraphs, the construction of the pedal action of organs, and of the keys of pianofortes and musical instruments, the construction of cutting and holding instruments and implements, and the construction of printing-presses.

5. That "parts" of the combination described and claimed in the said complete specification as part of the Plaintiff's invention, had not been invented by the Plaintiff at the date of the said letters patent.

6. That "parts" of the said combination, if so invented, were not described, or sufficiently described in the provisional specification on which the said letters' patent were issued.

7 and 8, related to the specification; 9 denied the usefulness, and 10 denied infringement. To those the Plaintiff did not object.

Mr. *W. Pearson*, for the Plaintiff:—

As to objections 1 and 2, the expression "carriage builders generally throughout *Great Britain*," is not a sufficient compliance with the statute (15 & 16 Vict. c. 83, s. 41): *Holland* v. *Fox* (1). As to 3, "carriage builders in or near *London*," is too vague: *Palmer* v. *Cooper* (2). As to 4, the word

(1) 1 C. L. Rep. 440. (2) 9 Ex. 231.

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"various" does not comply with the statute. In 5 and 6, the "parts" of the combination should have been specified: *Daw* v. *Eley* (1).

Mr. *Fooks*, for the Defendants:—

The objections are sufficient within the meaning of the statute. In *Jones* v. *Berger* (2), the words "at *Nottingham*," were held sufficient.

[He also cited *Heath* v. *Unwin* (3).]

SIR W. PAGE WOOD, V.C.:—

This motion must be allowed.

According to the language of *Tindal*, C. J., in *Fisher* v. *Dewick* (4), "the object of the statute of the 5 & 6 Will. 4, c. 83, s. 5, was not to limit the defence, but to limit the expense to the parties, and more particularly to prevent the patentee from being upset by some unexpected turn of the evidence."

The first expression to which the Plaintiff here takes exception is, "carriage builders generally throughout *Great Britain*."

But under the former statute of 5 & 6 Will. 4, generally worded as that was, where the objection stated, "a particular improvement had been used by *A. B.*, &c. (giving names and addresses), *and divers other people, within this kingdom and elsewhere*," the judges struck out the words, "and divers other people" as not being a *bonâ fide* averment: *Fisher* v. *Dewick*. (5).

Mr. *Fooks* relied on another case of *Jones* v. *Berger* (6), in which the words "at *Nottingham*" were considered to be sufficient. The Judges concurred in striking out the subsequent words "and elsewhere." and *Tindal*, C.J., says (7): "It appears to me that if the words 'and elsewhere' are struck out, substituting the places afterwards, if new evidence should arise within the Defendant's power to produce at the trial, there is no objection to this form of stating the objections in the notice. I think this case is distinguishable from that of *Fisher* v. *Dewick*, in which the patent

(1) Law Rep. 1 Eq. 38.
(2) Webst. Rep. on Pat. 544.
(3) Ibid. 551 (n)
(4) Ibid. 267.
(5) Webst. Rep. on Pat. 551 (n).
(6) Ibid. 544.
(7) Ibid. 549.

was for alterations and improvements in the manufacture of the machinery by which lace is made." And Mr. Justice *Maule* observes, that the reason why the objection was held to be not sufficient in that case, was because the invention for which the patent was obtained was itself in use by certain persons named, *and by other persons*, so that there was no restriction or particularization of the simple objection or statement in the plea, that the alleged invention was in use before the patent. But where the patent was for the improvement in making starch generally, and the objection pointed to the public use of a particular kind of starch, namely, rice starch, the words "at *Nottingham*" were held sufficient without names, because there might be fabrics of that kind in the market which could be shown to have been made out of that kind of starch, though it might not be possible to trace where they came from.

Applying, therefore, the principle of *Fisher* v. *Dewick* to this case, the first objection must go out altogether. The second must go also, as being, if possible, worse than the first. With regard to the third, there is no doubt a reasonable and intelligible objection stated, but it is too general, and I should be disposed to tie the Defendants down to specify the sort of carriage in which the alleged prior user took place, if he could not give the name of the manufacturer. This would be to bring the case in conformity with *Jones* v. *Berger*. Starch makers are a limited class, and "at *Nottingham*" may, in their case, be sufficient; but carriage builders "in or near *London, Liverpool*, &c.," is too general a description, unless the particular sorts of carriages are specified. The fourth objection is also too vague. An allegation of general user does not of course admit of being met precisely. It will not do for the Defendants to say, I am prepared to assert that this sort of lever was applied to several sorts of things before, without specifying any (which was not the case of *Penn* v. *Bibby* (1)), but I will leave it open to myself to try any fresh case that I may discover. Objections five and six must also be struck out as being not specific enough to raise distinct issues. The first six objections must all be disallowed.

The real object is to secure to both parties a fair trial, and with

(1) Law Rep. 1 Eq. 548.

V.-C. W. 1866 MORGAN v. FULLER (2).

that view I must allow this motion, and direct fresh particulars of objections to be filed within seven days.

The costs of the motion will be costs in the cause.

Solicitors for the Plaintiff: Messrs. *Bicknell & Bicknell.*
Solicitor for the Defendant: Mr. *G. F. Cooke.*

V.-C. W. 1866 *May 5.*

EARL BEAUCHAMP *v.* WINN.

Practice—Revivor of Suit—Death of sole Plaintiff—Order to answer Interrogatories—15 & 16 Vict. c. 86, s. 52.

In a suit relating to real and personal estate, where after interrogatories filed, but before answer, the sole Plaintiff had died, the Court on the application of the heir-at-law, who was also the executor of the deceased Plaintiff, made an order to revive, and as the time for answering had expired, ordered that the Defendant should, within twenty-eight days, answer the interrogatories.

IN this suit, which related to real and personal estate of large amount, after interrogatories filed, but before answer, the sole Plaintiff died, and his interest in the subject-matter of the suit had become vested in the present Earl *Beauchamp*, as his heir-at-law and executor, and the question arose whether an order to revive could be made under the 52nd section of the 15 & 16 Vict. c. 86.

At the suggestion of the Clerk of Records and Writs, the case was mentioned to the Vice-Chancellor.

Mr. *F. J. G. Walford*, on behalf of the heir-at-law, submitted the point to the Court, and suggested that the following order should be made: "The common order to revive, and also that the Defendant do answer the interrogatories within twenty-eight days."

The VICE-CHANCELLOR made the order to revive, and was at first inclined to think that the common order would be sufficient; but upon being informed by the Clerk of Records and Writs that the time for answering had expired, made the order suggested. His Honour did not think it requisite to add liberty to apply at Chambers to enlarge the time.

Solicitors: Messrs. *F. H. & H. H. Walford.*

STEPHENSON *v.* BINEY.

V.-C. W.
1866
May 8.

Practice—Depositions of Witnesses in another Court—Order to read Evidence—Court of the County Palatine and Court of Chancery.

An order of course to read, in a suit in Chancery, copies of a bill, order, decree, and affidavits in a suit in the Court of the County Palatine, alleged to have been between the same parties and directed to the same issue:—*Held* irregular

THIS was a motion on behalf of the Defendant in the cause to discharge an order made at the Rolls as of course on the 13th of April last, that the Plaintiff might be at liberty to read the documents therein specified; being copies of a bill, order, decree, and affidavits filed and used in a suit which had been brought by the Defendant *Biney* against the Plaintiff *Stephenson* in the County Palatine Court of *Lancaster*.

The object of that suit was to dissolve a partnership between the Plaintiff and Defendant, as hotel-keepers at the *Clarence Hotel, Spring Gardens, Manchester*, on the ground of the articles, or if not, on the ground of a dispute between the partners. The Vice-Chancellor *James*, by the first order, discharged the Defendant *Biney's* motion for a receiver, and by the decree dismissed his bill with costs.

In support of this motion it was deposed that every one of the deponents in the County Palatine suit was living.

On the other hand it appeared that the affidavits comprised in the order now sought to be discharged, included all the evidence that was used by either party in the County Palatine suit, that they consisted of 102 brief sheets or 318 folios, and that the affidavits in which the Defendant *Biney*, by himself or with others, was a deponent, consisted of twenty-five brief sheets.

The object of this cause was to obtain a receiver and, if necessary, a declaration of the dissolution of the partnership.

Mr. *G. M. Giffard*, Q.C., and Mr. *E. R. Turner*, for the motion:—

In *Hope* v. *Liddell* (1) an order of this kind was discharged as irregular.

(1) 21 Beav. 180.

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STEPHENSON v. BINEY.

The rule is laid down by Sir *John Leach* in *Williams* v. *Broadhead* (1). His Honour said that, where there was a cause and cross cause, the order was extremely useful. But where the former suit was in the Exchequer and the latter in Chancery, not the depositions themselves (which the Court of Exchequer would not part with), but office copies (by which the Vice-Chancellor must have meant examined copies) of the depositions, were all that could be had, and these the Plaintiff was entitled to read as evidence without any order, on simple production of proper copies of the bill and answer, for the purpose of shewing that the parties and the issue in the two suits were the same. Nor could the Plaintiff be relieved from the necessity of producing copies of the bill and answer for this purpose. Hence, as the order served no purpose whatever, it was discharged. That case was precisely similar to the present.

On the authority of that case, Mr. *Daniell* in his Chancery Practice (2) observes that "an order of the Court directing the depositions in the Exchequer to be read at the hearing in Chancery will not be necessary or proper."

It would be otherwise if any of the witnesses in the County Palatine suit were dead, or proved to be in such a state of health as to be incapable of giving evidence: *Palmer* v. *Lord Aylesbury* (3).

The Defendant appears to be in this dilemma: either the subject matter of the suits is the same, and if so, the rule laid down in *Williams* v. *Broadhead* must apply; or it is different, and then the 4th rule of the 19th Consolidated Order comes into operation, and the order can only be upon motion.

Mr. *E. K. Karslake,* for the Plaintiff.:—

The order of course is only an attempt to adapt the new rules to old principles of practice. The suits are between the same parties, and are substantially a cause and cross cause. The Plaintiff was successful in every point in the County Palatine suit, and it would be a monstrous proposition to say that he is to be compelled to have 318 folios of affidavits all reheaded and resworn in order to repeat the same evidence *verbatim*. Affidavits in the Court of the County Palatine are all in writing.

(1) 1 Sim. 151. (2) Ed. of 1845, p. 827. (3) 15 Ves. 176.

The old cases that have been referred to were decided when notices of motion for decree were unknown.

SIR W. PAGE WOOD, V.C.:—

As far as the authorities go, the established practice seems to be this—that where there is a cause and cross cause in the same Court, the evidence taken in one suit may by order of course be read in the other, because, as Sir *John Leach* observed in *Williams* v. *Broadhead* (1), it saves the necessity of examining witnesses in both causes.

It also appears from Mr. *Daniell's* Chancery Practice (2) that with regard to pleadings in a cause in *this* Court, when they have once been duly filed they may be put in without oath; for as the Court is in the habit of noticing its own proceedings, they are capable of proof without being formally inrolled as of record, upon the production of office copies. Thus (3) the depositions of witnesses which have been taken in one cause in this Court may, by order, be read at the hearing of another cause, provided the parties are the same, and the point in issue is the same in both causes; nor is it necessary to produce copies of the bill and answer.

But with regard to suits in the Court of Exchequer, it seems that a different rule used formerly to prevail, and one sees the reason of it.

The rule by which the Court of Chancery used to be governed with regard to suits in the Exchequer is thus stated by Mr. *Daniell* (4): "Depositions taken in the Court of Exchequer may be read as evidence in Chancery in a cause relating to the same matter, and between the same parties or their privies. . . . It is, however, to be remarked that the depositions must be introduced as evidence in the ordinary course, and that an order of the Court directing the depositions in the Exchequer to be read at the hearing in Chancery will not be necessary or proper;" the reason being that this Court does not know what the record of the Court of Exchequer is.

(1) 1 Sim. 151.
(2) Ed. of 1845, p. 655.
(3) Ed. of 1845, p. 828, 829.
(4) Ibid. p. 827.

V.-C. W. 1866 STEPHENSON v. BINEY.

Therefore, according to the authorities, I think I am bound to discharge this order, with costs.

Solicitor for the Plaintiff: *J. Elliott Fox*, agent for *Earle, Son, Hopps, Orford, & Earle, Manchester.*

Solicitors for the Defendant: *N. C. & C. Milne*, agents for *Thomas Sutton, Manchester.*

V.-C. W. 1866 *March* 15, 23.

ATTORNEY-GENERAL *v.* RICHMOND.

12 Jur. N.S. 544

Nuisances Removal Acts, 1855 *and* 1860 (18 & 19 *Vict. c.* 121; 23 & 24 *Vict.* c. 77)—*Local Authority—Highway Board—Injunction.*

10 L.T. 131, 20 L.T.D.S. 597 598-9, 600

The Court will restrain the members of a highway board (being the local authority for carrying out the provisions of the *Nuisances Removal Acts*) from allowing any fresh communications to be made with a sewer constructed by their predecessors in office which occasions a nuisance to the inhabitants of the adjoining parish by draining into a stream flowing through such parish, although from the limited nature of their powers no order can be made against the board which will have the effect of compelling them to abate the nuisance altogether by stopping up the sewer, and ceasing to drain into the stream.

THIS was an information at the relation of the clerk of the *Tottenham* Local Board of Health (who was Plaintiff in the accompanying bill), against the several Defendants (who constituted the board for the repair of the highways in the parish of *Hornsey*, elected and constituted under the provisions of the *Highways Act*, 1835), for the purpose of restraining them from causing or permitting any sewage from the parish of *Hornsey* to flow or be discharged into a stream called the *Moselle*, and from doing any act whereby that portion of the stream which flows through the parish of *Tottenham* might be polluted.

The information and bill stated that there was no Local Board of Health for *Hornsey*, nor any council, or trustees, or Commissioners under any Improvement Act, for such parish, and, consequently, that the Defendants, who were the Highway Local Board for *Hornsey*, appointed under 5 & 6 Will. 4, c. 50 (*The Highways Act*, 1835), were the local authority to execute the provisions of the

Nuisances Removal Acts, 1855 and 1860 (18 & 19 Vict. c. 121, and 23 & 24 Vict. c. 77.) A stream called the *Moselle* flows from *Hornsey* parish into and through the greater part of *Tottenham* parish, discharging itself into the *Lea*. Some few years before the filing of this bill, the *Hornsey* Highway Board constructed a system of drainage for that part of the parish which adjoins *Tottenham*, by which the whole of the sewage—without any attempt at deodorization—was conveyed into the *Moselle*, a short distance before it reaches *Tottenham* parish. Until the construction of these new sewers, the *Moselle* was comparatively pure, the water being used for bathing, fishing, drinking, and other domestic purposes by persons on its banks; and although the sewage from a few of the houses in *Tottenham* used to find its way into the *Moselle*, it was not to such an extent as materially to foul or injure the stream. Recently, however, £7000 had been expended by the *Tottenham* Board of Health in extending the system of sewage provided for the more populated part of the parish, so as to prevent the discharge of any sewage matter into the *Moselle* in the parish of *Tottenham*. The discharge of the *Hornsey* sewage into the *Moselle* was stated to have polluted the water to such an extent as to stop bathing, to kill the fish, and prevent the cattle from drinking, and to occasion a most foul and offensive stench, and create an intolerable nuisance to the people of *Tottenham*. On being applied to in December, 1864, the *Hornsey* Highway Board promised to attend to the matter; but nothing was done to remedy the evil, which in the course of last summer became much more serious, and was the subject of a memorial to the *Tottenham* Local Board from several of the occupants of houses near the *Moselle*. Frequent applications to the *Hornsey* Board having been made without result, the present information and bill were filed in November last.

In a voluntary answer, filed by the Defendants, they stated that they were elected by the inhabitants of *Hornsey*, in March, 1865; that the board was not a corporation, and that its members were elected annually, pursuant to the provisions of the *Highways Act*. The Defendants admitted that as members of the Highway Board they were the local authority for executing the *Nuisances Removal Acts*, but denied that they were the proper parties to be sued in

V.-C. W. 1866 ATTORNEY-GENERAL v. RICHMOND.

respect of the matters complained of in the information. With respect to the alleged nuisance, it was not created or occasioned by them, and they could not prevent it. They were advised that they had no power whatever to abate it, or to raise money for the purpose, and they had no money in their hands or under their control which could be properly applied to such purpose. The answer went on to state that it was only that part of the *Moselle* which was in the parish of *Tottenham*, and beyond the limits of their authority, that was offensive, and that they had never known it to be otherwise; that the sewers now complained of by the information were chiefly made and completed five or six years ago, with the consent and approval of the *Tottenham* Local Board and their surveyor, and that since such completion nothing whatever had been done by the Defendants, or any other Highway Board of *Hornsey*, to increase the discharge of foul or offensive matter into the *Moselle*.

Evidence, which it is not necessary for the purposes of this report to state, was given as to the nature and extent of the nuisance.

The motion for an interlocutory injunction was by consent turned into a motion for decree.

Mr. *Rolt*, Q.C., and Mr. *Kay*, in support of the information and bill, contended that it was clearly established upon the evidence that a nuisance, as defined by the *Nuisances Removal Act*, 1855 (18 & 19 Vict. c. 121, s. 8), had been created at a spot within the jurisdiction of the Defendants. The Legislature had imposed upon the Local Board the duty of preventing this injury, and the Defendants, who were "the local authority to execute the Act," were not entitled to defend themselves by saying that they were not the identical board that made the sewer. There was the same succession and continuity with regard to their predecessors as existed in any Local Board of Health. If in execution and excess of their statutory powers, a body constituted by Act of Parliament had occasioned a nuisance or injury to others, they had power by necessary implication to redress the injury, and restore things to their original position; and whatever statutory funds they might have under their control would be liable for the purpose. With respect to acquiescence, the Plaintiffs had been met with the

constant assurance that steps should be taken to remedy the evil. If they had come at once, before the nuisance assumed its present dimensions, they would have been told that they had come too soon, and that it was a mere *quia timet* bill: *The Attorney-General* v. *The Mayor and Corporation of Kingston-upon-Thames* (1).

[The VICE-CHANCELLOR:—The evidence in that case shewed that the water would not be seriously affected for some years to come.]

In any case acquiescence was not construed against a Plaintiff so strictly at the hearing of the cause as upon interlocutory motion: *Patching* v. *Dubbins* (2). They also referred to *Cator* v. *The Lewisham Board of Works* (3); *Goldsmid* v. *The Tunbridge Wells Improvement Commissioners* (4).

Mr. *W. M. James*, Q.C., and Mr. *Lindley*, for the Defendants, contended that from the position of the Defendants, who were a mere Highway Board annually elected, neither a corporation nor even a *quasi* corporation, without any property under their control, or means of raising money by a rate, the Court could not make any order which would have the effect of abating the nuisance (even admitting that it existed to the extent asserted by the Plaintiffs). The bill was in reality an attempt to get this Court to assume the authority of the Court of Queen's Bench, and grant a *mandamus*. But even the Court of Queen's Bench would refuse to grant a *mandamus* against persons in the position of the Defendants: *Ex parte Bassett* (5).

The Defendants had no power to prevent the evil or to stop up this sewer, and if they did so, the result must be a nuisance to the people of *Hornsey*, for which they might be indicted, and the Court would not make any order which would have the effect of compelling the Defendants to commit a nuisance. But in any case (admitting that a nuisance existed) the present Defendants, the Highway Board of 1865, were not responsible for the acts of their predecessors, the Board of 1859, with whom they had no continuity of property or of right. Then again if the Court were

(1) 13 W. R. 888.
(2) Kay, 1.
(3) 13 W. R. 254.
(4) Law Rep. 1 Eq. 161; affirmed Law Rep. 1. Ch. 349.
(5) 7 E. & B. 280.

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to make an order against the *Hornsey* Highway Board, it would be nugatory, as the Defendants went out of office in the course of the present month, and no one would be found to serve, if they must do so with an injunction hanging over their heads individually. What power would they have to comply with it? Any order which was to be carried out must involve an outlay of money, and no power was given to the Defendants (as a Highway Board) to assess the parish by a rate for the purpose (23 & 24 Vict. c. 77, s. 4). They also contended upon the evidence that the new sewer was in reality less offensive to *Tottenham* than the old system of drainage, and that whatever had been done, had been done *bonâ fide* for the purpose of amending an existing evil, and with knowledge and acquiescence on the part of the *Tottenham* Board of Health.

The suit was improperly framed, being against the members of the Highway Board individually; persons who had not themselves caused the nuisance and had no power to prevent it; and in any case the bill which accompanied the information was unnecessary.

[The VICE-CHANCELLOR, upon the frame of the suit referred to 11 & 12 Vict. c. 63 (*Public Health Act*, 1848), s. 138, observing that it seemed to authorize proceedings against a board which was not a Local Board of Health.]

We are here sued as individuals, and not as is pointed out by that section by our clerk. The Court must deal with the record as it stands, not as it might be when amended, and it is submitted that it is improperly framed.

Mr. *Rolt*, in reply:—

If the Defendants have done wrong, and are still doing wrong, it does not lie in their mouths to say that they cannot cease to do so. The difficulty of abating the nuisance is no answer to the present suit. The Defendants must do what any Local Board of Health would be compelled to do, viz., deodorize the sewage before pouring it into the stream, and the Court will find means for enforcing its order; *Spokes* v. *Banbury Board of Health* (1).

(1) Law Rep. 1 Eq. 42.

SIR W. PAGE WOOD, V.C.:—

I have not the slightest doubt as to the existence of the nuisance complained of by the information, which is, in fact, almost admitted by the Defendants; but the nuisance having been created by the predecessors of the present local authority for the parish of *Hornsey*, the difficulty in the case arises from the very limited powers of the Defendants, and their singular legal *status*. In 1859 the local authorities for *Hornsey*, the predecessors in position of the present Defendants, exercising the powers conferred upon them by the *Nuisances Removal Act*, formed a new sewer, by which the whole drainage of *Hornsey* was collected and brought *en masse* into one channel, through which it was poured into the stream called the *Moselle*. Now, with all the evidence that I have before me, and the experience derived from former cases, I can have no doubt that any method of dealing with the sewage, by catching the solid portions and letting the liquid portions pass off, is no prevention of the nuisance. It has been decided, both at law and in this Court, that no person is entitled, on the ground of ancient custom or privilege, to collect a mass of sewage matter, and pour it in, at one point, into a stream in such a quantity, that the river cannot dilute it, on its passage down to the lower riparian proprietors, as the effect of such an act is to create an evil which must be illegal, being such as no custom can authorize. The correspondence contains a plain and distinct admission by the Defendants that the evil exists, and a promise that they will see what they can do towards remedying it. Under these circumstances it is unnecessary to go through the evidence which has been adduced as to the amount and character of the nuisance, which is distinctly traced as coming from *Hornsey*, at the outfall, where the whole of the filth of that parish is poured out into the stream immediately at the *Tottenham* border. But there is a great difficulty in dealing with the case from the singular legal *status* of the Defendants. They are not the Local Board of Health, and, therefore, they have not the sewers vested in them. They have a certain power or right of arresting a nuisance when they find it existing in their own parish, and only in their own parish, They have power to construct sewers for the purpose of arresting a

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nuisance, and also power to compel people to drain into them; and although it might be held that they have a certain control over the sewer when it is constructed, I do not find any clause in the Acts which enables me to say that they have any power to prevent those who have been once allowed to drain into their sewer from continuing to drain into it: in other words, of shutting up their sewer against drains which have already been allowed to come into it. Section 22, which was referred to as shewing that they have such a power, obviously relates to nuisances in their own parish only. They cannot, of course, be allowed to poison their neighbours for their own advantage. But it is, as it seems to me, impossible for them to raise a rate for the purpose of executing works which would have the effect of confining to the parish of *Hornsey* that nuisance which it is their duty, as the local authority, to do their best to avert. The Court may certainly hold that any existing local authority may be restrained from the completion of any act which they are about undertaking; but the difficulty arises from the very limited powers of bodies, such as the present Defendants, succeeding each other annually, having no permanent existence, and no power to stay anything done by others which does not create a nuisance within the parish of *Hornsey*. There is great difficulty, therefore, in dealing with the absolute removal of this nuisance, and in giving those directions which I have given over and over again with reference to local boards, which are held to be corporate bodies. But this much may be done, as it appears to me: these gentlemen can prevent any fresh communication being made with their drains. Although they are going out of office in a fortnight, I think it is very desirable that I should now make a decree which will bind them, and at all events inform their successors of what the view of the Court is: and if any steps are taken by any future board to do that which I have restrained the present board from doing, the Court will know how to deal with the matter. I think the present board may properly be restrained from allowing any new communication to be made with their main sewer which is a nuisance. I do not know how far time or otherwise may have operated, to prevent those, who commit the nuisance by pouring their sewage into this stream, being dealt with individually. As

regards the present board, they have power not only to authorize but to compel people to send their drainage into this new sewer. That is a thing which ought to be prevented; but beyond that I do not see any way of dealing with this case. Independently of the provisions of the Act, which says that they shall not be themselves personally liable, and of the considerable difficulty of the case, I do not think it is a case for costs. The new system of drainage was carried out in 1859, and the Defendants did not come into office until 1865. What was done was done with the knowledge of the *Tottenham* authorities; and although there is no evidence that the works were approved of, no steps (which might, I think, have been effectually taken against the Board at that time) were then taken to stop it.

As to the frame of the suit, the rule as to suing and being sued by their clerk is not extended to a local authority of this sort; and therefore the suit is not improperly framed in this respect. Mr. *Heath*, however, has been erroneously made a Plaintiff, and therefore the bill (filed together with the information) will be dismissed. No additional costs have been incurred in this respect, but it appears to me that the inhabitants, and not the Board of Health, are the persons injured.

Mr. *Rolt*:—Mr. *Heath* was made Plaintiff because the Attorney-General could not have asked for compensation in respect of the damages and expenses which he has been put to.

SIR W. PAGE WOOD, V.C.:—

There is an actual expenditure which has been allowed to be incurred by the people of *Hornsey*, which, although it may have been useless, has not been interfered with. I can only give damages for what has occurred since these gentlemen have been in office, which would be a very small affair, and, indeed, the amount of damage done by the acts of the present Board cannot be eliminated from the amount occasioned by anterior boards. I see no reason why Mr. *Heath* should have been made a Plaintiff: he is not a necessary party in any way.

MINUTES OF DECREE:—Dismiss the bill filed by Mr. *Heath*, and on the information restrain the Defendants as constituting the local authority at *Hornsey*, under

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the *Nuisances Removal Acts*, 1855 and 1860, their servants and agents, from making any new drain which shall communicate with the new system of drainage constructed by the local authority under the said Acts at *Hornsey* in 1859, and the outfall of which is into a stream called the *Moselle*, and also from permitting any new drain to communicate with such new system of drainage, or with any portion of the drainage under the control of the local authority, and having its outfall into the said stream, or otherwise occasioning any increase of drainage into the stream, unless such drainage shall have been first purified from sewage matter, so as not to occasion any pollution to the said stream in its passage through the parish of *Tottenham*.

This decree to be without costs.

Solicitor for the Relator: Mr. *William Heath*.
Solicitors for the Defendants: Messrs. *Tatham & Sons*.

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PENN *v.* JACK AND OTHERS.

Practice—Patent—Evidence—Trial of Issues.

Upon the trial of issues in a patent case the Plaintiff is entitled to call evidence in reply, for the purpose of rebutting a case of prior user set up by the Defendant.

But after the evidence for the defence has been summed up, the Defendant will not be allowed to adduce further evidence in answer to that given by the Plaintiff in reply.

IN this suit, which was for the purpose of restraining an infringement of the Plaintiff's patent, obtained in October, 1854, for "An improvement in the bearings and bushes for the shafts of screw and submerged propellers," it was ordered, "that a record for trial be set down after service of notice of motion for decree for hearing before this Court"—"without a jury, by the consent of both parties, to try the following questions of fact:—

"1. Was the invention for which the letters-patent of the 2nd October, 1854, in the bill mentioned, was granted, new within the United Kingdom at the date of the patent?

"2. Sufficiency of specification.

"3. Was the alleged invention proper subject-matter of a patent?

"4. Infringement."

The Plaintiff was ordered by a certain day to deliver to the

Defendants' solicitors particulars of the breaches committed by the Defendants on which he intended to rely, and the Defendants, within one month after delivery of Plaintiff's particulars of breaches, to deliver to Plaintiff's solicitor particulars of objections; any of the parties to be at liberty to sue out subpœnas for attendance of witnesses at the trial of such issues. It was also ordered, that, notwithstanding the notice of motion for decree, Plaintiff and Defendants were to be at liberty to examine and cross-examine at the hearing of the cause any witnesses who might have made affidavits, either in Court or before the examiner, or both in Court and before the examiner.

In the particulars of objection delivered by the Defendants, they stated that the alleged invention was not new at the date of the patent, inasmuch as wood had, prior to the date of such patent, been used in the construction of bearings and bushes of screw-propellers and other shafts rotating in or lubricated by water, in the following amongst other instances; viz., in 1851, for the screw propeller of the ship *Livorno*, fitted by *James Jack* in the manner mentioned in the answer of Defendants *Bibby & Leyland*, and in and prior to 1854 for the screw-propeller of H.M.S. *Himalaya*, and in 1852 for the screw-propeller of the Austrian war steamer *Radetzky*, fitted with wooden bearings (in strips or fillets) by *Money, Wigram, & Co.* The particulars of objection also stated that the invention was not new at the date of the patent, inasmuch as pieces of wood had, prior to the date of the patent, been fixed and used for bearings and bushes of rotating shafts, in such a manner as to admit of water or other lubricating matter flowing freely between the pieces of wood and between the inner surface of the bearings and the outer surface of the rotating shaft. In support of this objection instances were stated of the use of water wheels working in wooden bearings lubricated by water at different places before the date of the patent. Four prior specifications, in which wood was employed in the construction of bearings for rotating shafts and other machinery, were also stated in the particulars of objections.

The Defendants gave evidence (*inter alia*) that wooden bearings had been applied in May, 1851, to the propeller shaft of the screw-steamer *Livorno*, and used with success in a voyage from

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Liverpool to the *Mediterranean* and back in the course of that year. No evidence was given in support of the cases of the *Himalaya* and the *Radetzky*, which were mentioned in the particulars of objection.

At the conclusion of the Defendants' evidence, the Plaintiff proposed to call evidence for the purpose of contradicting the Defendants' witnesses, and showing that the bearings of the *Livorno* during the voyage referred to were of cast iron.

Mr. *Kay* (with whom were Sir *Hugh Cairns*, Q.C., and Mr. *T. Webster*, Q.C.), for the Defendants, contended that the Plaintiff was not entitled to call witnesses in reply. The issue raised was the novelty of the patent, the *onus* of proving which rested on the Plaintiff. He had brought forward his evidence, and when his case was closed, and the Defendants had called their witnesses (not to open any new case, but to disprove the issue put forward affirmatively by the Plaintiff), he (the Plaintiff) could not be allowed to go on *ad infinitum* bringing forward a totally new set of witnesses by surprise upon the Defendants. The only instance in which evidence in reply could be called, was for the purpose of contradicting the Defendants' witnesses, by shewing that they had, on some former occasion, said something different.

Mr. *Cotton* and Mr. *Theodore Aston* (Mr. *Rolt*, Q.C., and Mr. *Grove*, Q.C., with them), for the Plaintiff, contended that the right to call witnesses in reply was clear, and established by the every-day practice of the Common Law Courts. On all issues of fact both sides must be heard; and though the use of wood bearings in the *Livorno* was specified in the particulars of objections, it was impossible for the Plaintiff to know the nature of the evidence to be given, or to disprove the case alleged in defence, until the Defendants had examined their witnesses.

Mr. *Kay*, in reply, submitted that the burden of establishing the novelty of the patent rested on the Plaintiff, who could not have been taken by surprise by the evidence for the defence, as, in addition to the particulars of objection, the answer stated that wooden bearings had, in 1851, been fitted in the *Livorno* by the Defendant *Jack*.

SIR W. PAGE WOOD, V.C.:—

I think the Plaintiff is entitled to adduce evidence in reply for the purpose of rebutting the case set up by the Defendants; and for this reason, that it is quite impossible for him to know what is the nature of the evidence which will be produced. The Defendants, who contest the validity of the invention, have in effect put in a plea denying the novelty of the Plaintiff's patent; and the affirmative of the issue thus raised in reality rests with the Defendants, who are not obliged to give the names of their witnesses. How can the Plaintiff possibly meet such a case until he hears the evidence for the defence, and knows what their witnesses will prove? I should be very sorry to have to put the parties to all the expense and delay of a new trial, which I should have to direct if this evidence were excluded. Besides which, the witnesses are at hand and ready, and the sensible and obvious course is to examine them now. The practice at common law is stated in *Taylor on Evidence* (1); and it appears that where, as here, several issues are joined, the Plaintiff may content himself with adducing evidence in support of those issues which he is bound to prove, reserving the right of rebutting his adversary's proofs in the event of the Defendant establishing a *primâ facie* case with respect to the issues which lie upon him. In support of this proposition, *Shaw* v. *Beck* (2) is cited, where *Parke*, B., used the following expressions: "But *Abbott*, C. J., laid down what appears to me to be a more reasonable rule, by holding that the Defendant was bound to prove his plea, and that the Plaintiff might answer it by additional evidence." Other instances are also mentioned, all shewing the wide discretion given to the Judge in allowing evidence to be given by the Plaintiff in reply. The Plaintiff has put in his letters-patent as formal evidence of his title. The Defendants then plead want of novelty, and give, in proof of the issue thus raised by them, special evidence, which the Plaintiff is entitled to rebut by evidence in reply. Regarding this case as one of an affirmative plea, the burden of proving which rests on the Defendants, I feel bound to admit the evidence proposed to be given by the Plaintiff in reply.

(1) Section 357, *et seq.* (2) 8 Ex. 392.

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After the evidence of the Plaintiff in reply had been given, and the Defendants had summed up their evidence by their junior counsel,—

Sir *Hugh Cairns*, Q.C., for the Defendants, asked to adduce evidence, consisting of books, and the examination of the officer of the dock by whom they were kept, to shew that the *Livorno* was not in the graving or dry dock at the particular time which one of the witnesses adduced by the Plaintiff, in reply to the case made by the Defendants as to the *Livorno*, stated to be the occasion when he examined the bearings of the *Livorno*.

Mr. *Grove*, Q.C., and Mr. *Cotton*, for the Plaintiff, resisted the application, on the ground of the extreme danger of allowing this evidence, which was adduced, not to disprove a new issue raised by the Plaintiff in reply, but to strengthen the Defendants' evidence, in answer to which the Plaintiff's evidence in reply had been given.

Sir W. Page Wood, V.C., after stating that he considered the Plaintiff had been entitled, as of right, to adduce evidence in reply on that issue where the onus of proof was on the Defendants, and as to which the Plaintiff, in opening, was not bound to give, and did not give, any evidence, refused to allow the Defendants to adduce this further evidence, on the ground that a party could not be allowed to adduce further evidence to corroborate his own case, after not only his own evidence, but also that in reply, had been closed and after his Counsel had summed up his evidence, and in a case where there was a direct conflict between the witnesses.

Solicitors for the Plaintiff: Messrs. *Hill, Son, & Heald.*
Solicitors for the Defendant: Messrs. *Norris & Allen.*

WILKINSON *v.* JOUGHIN

V.-C. S.
1866
April 19.

Will—Fraud by a Married Woman—Void Bequest—Bequest to supposed "Step-daughter."

The income of property was given by a testator to a woman in the character of, and whom he described as his wife, but who, at the time of the marriage ceremony with him and at his death, had a husband living:—

Held, in respect of the fraud committed by her, that the bequest was void.

The testator bequeathed the residue of his property to his "step-daughter," the daughter of his supposed wife:—

Held, that the bequest was valid.

WILLIAM THOMPSON, who died in July, 1864, by his will dated the 20th of May, 1864, devised and bequeathed all his real and personal estate to the Plaintiff and the Defendant *Joughin*, whom he also appointed executors, upon trust "to permit my wife, *Adelaide*, to receive from my death the net annual income thereof during her life." And after her death the testator directed his trustees to sell his real estate, and to convert and get in his personal estate, and to invest the moneys to arise in trust for the benefit of his children; but if no child of his should attain the age of twenty-one, or be married, then upon trust to pay certain legacies; and as to the residue, "In trust for my step-daughter, *Sarah Ward*, for her absolute use. But in case she shall die without leaving issue, upon trust to pay the same moneys to *John Wilkinson* and my cousin, *Anne Hammond*, in equal shares. I direct that my wife shall out of the income of my said estate maintain, educate, and bring up my children until the age of twenty-one years (but my trustees shall not be obliged to see this direction fulfilled), and that she shall receive and enjoy such income as her separate estate, without the control or interference of any future husband, and her receipt to be, notwithstanding coverture, an effectual discharge for the same."

The testator left no issue him surviving. The bill alleged that on the 15th of October, 1849, *Thomas Ward and Adelaide*

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Ward (then *Rowntree*) were married at *Great Grimsby*, and that the Defendant *Sarah Ward* was a child of that marriage; and that on the 20th of May, 1863, the Defendant *Adelaide Ward* and the testator went through the ceremony of marriage at *Liverpool*—the Defendant *Adelaide Ward* having represented herself to the testator as, and he having believed her to be, a widow—the Defendant *Thomas Ward*, her husband, being then, and in March, 1865, when the bill was filed, alive. The Plaintiff submitted to the judgment of the Court, whether the Defendant *Adelaide Ward*, or the Defendant *Thomas Ward*, her husband, in her right, could take any interest under the will; and also what interest (if any) the Defendant *Sarah Ward* took under it; and prayed that the trusts might be performed by the Court, and for a declaration as to the rights of all persons interested under the will, and for an account and inquiries. The evidence, in the view taken of it by the Court, sustained the conclusion that the misrepresentation by *Adelaide Ward* was wilful.

Mr. *Malins*, Q.C., and Mr. *Horsey* for the Plaintiff:—

It is clear from the evidence, which confirms the allegations in the bill, that *Adelaide Ward* deceived the testator, and that, consequently, she is not entitled to anything: nor can *Sarah Ward* claim any interest, for the bequest in trust for his step-daughter must be read in conjunction with the prior gift in trust to permit his wife *Adelaide* to receive the income from his death; and the deceit practised by *Adelaide* in making the testator believe she was a widow extends to the gift to the person whom he called his step-daughter, and whom he, as such, meant to benefit. Both the bequests are therefore wholly invalid.

In *Kennell* v. *Abbott* (1), where a legacy was given by a woman to a man in the character of her husband, whom she supposed and described as such, but who at the time of the marriage ceremony with her had a wife living, the Master of the Rolls said (2): "Upon general principles I am of opinion it would be a violation of every rule that ought to prevail as to the intention of a deceased person if I should permit a man availing himself of that character of husband of the testatrix, and to whom, in that character, a legacy is given, to

(1) 4 Ves. 802. (2) Ibid. p. 808.

take any part of the estate of a person whom he so grossly abused; and who must be taken to have acted upon the duty imposed upon her in that relative character. I desire to be understood not to determine that where, from circumstances not moving from the legatee himself, the description is inapplicable, as where a person is supposed to be a child of the testator, and from motives of love and affection to that child, supposing it his own, he has given a legacy to it, and it afterwards turns out that he was imposed upon, and this child was not his own, I am not disposed by any means to determine that the provision for that child should totally fail; for circumstances of personal affection to the child might mix with it, and which might entitle him, though he might not fill that character in which the legacy is given. My decision, therefore, totally avoids such a point. . . . . This is a legacy to her supposed husband, and under that name. He was the husband of another person. He had certainly done this lady the grossest injury a man can do to a woman, and I am called upon now to determine whether the law of *England* will permit this legacy to be claimed by him. Under these circumstances I am warranted to make a precedent, and to determine that wherever a legacy is given to a person under a particular character which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it; and therefore he cannot demand this legacy."

We ask for an administration decree, and for a declaration that *Adelaide* and *Sarah Ward* are not entitled to anything under the will; *Giles* v. *Giles* (1); and *Rishton* v. *Cobb* (2).

Mr. *Bardswell* for the Defendants, the *Wards*:—

The Defendant *Adelaide* admits she represented herself to be a widow, but not with any intention to deceive. She had not heard anything of her husband for a very long period of time, and she fully believed that he was dead. The mistake was an honest one on both sides. No fraud having been committed the bequests ought to prevail.

(1) 1 Kee. 685. (2) 5 My. & Cr. 145.

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SIR JOHN STUART, V.C.:—

In my opinion the bequest in favour of *Adelaide Ward* is void. She has sworn in her answer that which has been distinctly disproved. The evidence shows that she imposed in a gross manner upon the testator. Therefore, there must be a declaration to the effect that the bequest to *Adelaide Ward*, the pretended wife of the testator, is wholly void, and then there must be the usual decree for administration.

The right of the infant, *Sarah Ward*, seems to me very clear. An attempt has been made to show that inasmuch as the testator was defrauded by the woman whom he believed to be his wife, and was, through that fraud, induced to believe that her child was his step-daughter, the bequest to her wholly fails. But in the case referred to of *Kennell* v. *Abbott*, Lord *Alvanley* took care to distinguish between the cases of an innocent and a fraudulent legatee, and in my opinion there is no warrant for saying, where the testator knew this infant legatee personally, and intended to benefit her personally, that the language of the will is not a sufficient description. *Sarah Ward*, therefore, is entitled under the will, but I have some difficulty in saying that she is absolutely entitled, as there is a gift over in case she shall die under twenty-one years of age, and without issue.

Declare that the gift to *Sarah Ward* is valid, and the question, whether absolutely or not, will be left open until the hearing on further consideration.

Solicitors for the Plaintiff, and for a Defendant: Messrs. *Underhill & Field*, for Mr. *Etty*, Liverpool, and Mr. *W. G. Gray*, Manchester.

Solicitors for the other Defendants; Messrs. *Chester & Urquhart*, for Mr. *W. K. Tyrer*, Liverpool.

JENKINS *v.* JONES.

V.-C. S.
1866
April 30.

Will—Specific Bequest—Insanity of Testator—Conversion—Ademption.

A testator bequeathed farming stock which should be in his possession at his decease. He became of unsound mind, and so remained till his death; but two years before the latter event, the specific legatee, who was named as executor, with the concurrence of his mother, who was named as executrix, converted the stock into money, which they deposited in their own and a third person's names at a bank, where it remained till after the testator's death:—

Held, that there had been no ademption, and that the specific legatee was entitled.

EDWARD JONES by his will, dated the 1st of January, 1855, after disposing of his freehold and leasehold property in the manner therein mentioned, proceeded as follows:—"I give and bequeath to my son, *William Jones*, the whole of my farming stock, animate and inanimate, including the whole of my implements of husbandry, which shall be in my possession at my decease."

The testator appointed his wife and his son, the Defendants *Mary Jones* and *William Jones*, executrix and executor of his will, which contained no bequest of residuary personal estate. The testator died in February, 1860, and the will was proved shortly afterwards by his widow and son. On the 15th of January, 1858, the testator had a fit of apoplexy, and he was ever after, to the day of his death, of unsound mind, and consequently he was unable to manage his affairs, but he was never declared a lunatic by inquisition. The testator held a farm as yearly tenant, and in consequence of the state of his health, his wife, in March, 1859, after the usual notice, gave up possession of the farm; and *William Jones*, with the concurrence of *Mary Jones*, sold the farming-stock and implements by auction, in March, 1859, and deposited the net produce, amounting to £560 9*s.* 7*d.*, in their own and *David Roderick's* names, in a bank at *Neath*, and there it remained until after the death of the testator, when it was carried over to the separate account of *William Jones*.

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An administration summons was taken out by the Plaintiffs—some of the next of kin—and certain inquiries were directed.

The Chief Clerk, on the 26th of March, 1866, certified that the Plaintiffs sought to charge the Defendant, *William Jones*, with the sum above stated; and that he refused to charge him therewith.

The cause now came on upon further consideration, and upon an adjourned summons by the Plaintiffs, asking that the certificate might be varied by charging the Defendant, *William Jones*, or both the Defendants, with the above-stated sum, and that such other alterations might be made as necessary.

Mr. *Bacon*, Q.C., and Mr. *Freeling*, for the Plaintiffs:—

This case must be decided upon the language of the will. The testator gave to his son specific chattels, which at his death were not in existence, and the Court cannot now say that, notwithstanding the chattels cannot be found, and something has been done which was not directed by the testator—a conversion of the chattels into money—still the money shall go to the son just as if there had been no conversion. This is a case of ademption. The meaning of the testator must be looked at, and he certainly meant that his son should have the chattels if in existence at his death; but the nature of the property was so completely changed as to leave nothing to which the language of the bequest can apply. In *Ashburner* v. *Macguire* (1), the testator bequeathed a sum of stock, and, after making his will, sold it, and it was held that that made it as if it had never existed—the legacy was adeemed according to all the cases. *Barker* v. *Rayner* (2) was a case where a testator bequeathed his interest in policies, on the life of his wife, to his executors to pay legacies out of the proceeds, but the wife having died, and the money having been received by the testator, Lord *Eldon*, affirming the decision of the Vice-Chancellor, held that the legacies failed.

The case of *Durrant* v. *Friend* (3) is closely in point, because the acts there mentioned were not the voluntary acts of the testator, who having given specific chattels, which he insured, to a legatee, took them with him on a voyage, during which the ship,

(1) 2 Bro. C. C. 108. (2) 2 Russ. 122. (3) 5 De G. & Sm. 343.

and the chattels, and the testator, were lost and drowned, and it was held that the legacy failed. There is no difference between the case of a testator voluntarily adeeming a legacy, and the intended specific legatee converting the property mentioned in the will into money, which the testator, if he had lived, might have had and spent. The object of this conversion must have been to furnish the testator with what necessaries he might require. The executors did what the Court would have done for him, if there had been an application in lunacy. The money in the bank was something wholly different from the bequest. *Durrant* v. *Friend* determined the principle upon which the Court must act in this case, which is one of considerable nicety. The intention was to give the farming stock specifically, but before his death it was disposed of. The chattels had lost their character, and had ceased to exist. Upon the authorities and the facts of the case it is submitted that this sum of money is part of the testator's estate to be administered by the Court, and that it is distributable among the widow and next of kin. *Pattison* v. *Pattison* (1) is also in point.

Mr. *Caldecott*, for the Defendants :—

It was a proper and prudent thing to convert the stock into money, though not done by the authority of the testator. The proceeds of the sale are distinctly earmarked. In cases of ademption, it is clear that there must be an act of volition on the part of the testator himself, as in *Ashburner* v. *Macguire*.

The VICE-CHANCELLOR :—Is there any authority for the proposition that if another man makes a change in the specific legacy, without the knowledge and against the will of the testator, that is an ademption, so that the specific legatee shall not take anything? In *In re Pilkington's Trusts* (2) a testator bequeathed his *Lake Erie* bonds, which were, after the date of the will, converted into shares; but the testator subsequently made a codicil confirming his will, and I held that although there had been a change, there was not an ademption. If a man receives a debt which he has bequeathed, he, by his own act, puts an end to the bequest.

(1) 1 My. & K. 12. (2) 6 N. R. 246.

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But can another man, against the will and authority of the testator, by converting the specific legacy disappoint the legatee, and deprive him of the legacy in its converted state?

Mr. *Bacon*:—The decision in the case of *In re Pilkington* does not affect this case.

Mr. *Caldecott*:—*Durrant* v. *Friend* was not cited in argument, though bearing upon the facts in *In re Pilkington*. In *Shaftsbury* v. *Shaftsbury* (1) it was held that goods removed from one house to another without the privity of the testator would not defeat the legacy. That case is conclusive upon the point, and *Taylor* v. *Taylor* (2) is upon all fours with this case; for there leaseholds and stock-in-trade had been agreed to be converted, and had been delivered to the purchaser without the authority of the testator, and it was held that the specific legatee was entitled. The Vice-Chancellor distinctly stated that an act of dominion exercised by a person without the authority of the testator, although in his interest, cannot alter the rights of the parties under the will, and that the proceeds of the property must be dealt with irrespective of the wrongful or tortious conversion. *Browne* v. *Groombridge* (3), which was a case of conversion, did not meet with the entire approval of the Vice-Chancellor in *Taylor* v. *Taylor*, upon the authority of which, and of *Shaftsbury* v. *Shaftsbury*, the legatee here is clearly entitled to the money which represents the proceeds of the sale of these specific articles.

Then, as to the costs; if the Court shall hold that the specific legatee is entitled to the money, the Plaintiffs ought to pay his costs, or, as the administration summons was taken out for the sole purpose of having determined the right of the specific legatee, the Plaintiffs ought to have no costs. *In re Leeming* (4) was also referred to.

Mr. *Bacon*, in reply:—

In the case of *Duke of Beaufort* v. *Lord Dundonald* (5), goods in a house were bequeathed and afterwards ordered to

(1) 2 Vern. 747. (2) 10 Hare, 475. (3) 4 Madd. 495.
(4) 3 D. F. & J. 43. (5) 2 Vern. 739.

be removed to another house, and though not removed they did not pass to the legatee. *Taylor* v. *Taylor* is in favour of the Plaintiffs, for there the specific property remained, notwithstanding the agreement for sale. The principle of all the cases cited is, that the words of the will must have effect given to them, and the intention of the testator expressed in 1855 cannot now be carried into effect. Upon the facts and upon the authorities, I submit that the right of the next of kin is clearly established. Whatever may have been the intention of the testator when he made his will, it became quite impossible to give effect to that intention at the time of his death. The gift of these specific chattels must fail, because there were no such things in existence at the time of death. The next of kin are entitled to their shares of the fund, and the Plaintiffs to have their costs out of it.

Mr. *Caldecott* replied upon the new case referred to.

SIR J. STUART, V.C.:—

There is no case precisely in point to guide the Court upon the present occasion. The principle stated in all the cases is, that if there be a specific legacy of a chattel or of any thing else, and if at the time of the testator's death the specific thing cannot be found, the subject-matter of the bequest having been extinguished, the gift cannot take effect. This is the general principle, and it is perfectly intelligible. But the application of this principle to a case like the present is extremely difficult. In some cases the subject-matter of the specific legacy has been a debt due to the testator; and in the case of *Fryer* v. *Morris* (1), it was a promissory note for £400, and the gift was of all the money due to the testatrix upon the note at the time of her death; but part of the money had been paid in her lifetime, and Sir *W. Grant* held, as to so much of the money received by her, that it had ceased to exist; but he intimated that the rest, viz., all that remained due upon the promissory note, passed to the specific legatee. Looking at the words of that will it is difficult to understand how it could have been considered to be an arguable question. In other cases, where it has happened that a testa-

(1) 9 Ves. 360.

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tor, having given specifically a certain sum of money due upon a security, and also given to the legatee the benefit of the security, afterwards called in the money and mixed it with other moneys or expended it, it has been held that that is a case of ademption—that there is an extinguishment by the testator's own act of the subject-matter of the bequest.

But quite another consideration arises, where, after the testator has given a specific thing, and without his knowledge, perhaps against his wishes, or tortiously, another person has sold it or has done enough to wholly alter its character. In *Shaftsbury* v. *Shaftsbury* (1) the testator was not aware how the subject-matter of the bequest had been dealt with. No act of his had interfered with the furniture there specifically given, and it was held that another person could not alter his will, or deprive the legatee of the benefit intended for him by the testator. What has been done here? The testator after specifically giving to his son all his farming stock, animate and inanimate, became of unsound mind, and consequently incapable of exercising any act of volition either in regard to revoking the gift which he had made, or as to converting it; and in his lifetime the farm upon which the stock was, being no longer occupied by his wife, the son and legatee to whom the testator had given the stock, with the concurrence of his mother and co-executrix sold it and deposited the proceeds as a separate fund in a bank, and there it remained in their names, jointly with another, till after the testator's death. Can this conversion, which took place under such extraordinary circumstances, be considered an ademption of the specific bequest?

The case most nearly approaching to the present is *Re Pilkington's Trusts*, where the bonds which the testator gave specifically were converted by no act of his own, but by a resolution of the company—they no longer remained the specific things which the testator had given. It seemed to me clear that the testator had shown no intention to deprive the legatee of the property in its converted state. He had done nothing to deprive the legatee of the things given, and as they were found to exist, though in a different shape, I decided that they passed to the legatee. What

(1) 2 Vern. 747.

is this case? The farming stock ceased to exist, but the money was placed in a bank and there remained, and it clearly represented the value of the subject-matter of the bequest. The person who changed the character of the chattels was the legatee, to whom and for whose benefit they had been specifically bequeathed.

The case of *Durrant* v. *Friend* is a more extraordinary one than the present. Sir *James Parker*, in his judgment, made use of observations which seem to me to have a very pregnant meaning as applied to the facts of this case. There property which had been specifically given was insured, and the testator and the specific things bequeathed were lost at sea, and the legacy failed. But Sir *James Parker* said that if, at the death of the testator, the things which he had given had remained in specie, the policy of insurance would have been something to hold in trust for the specific legatee. Though I think that the decision in that case was a strong one, still I do not desire to raise a doubt as to its being sound law. I think that as it was by no act of the testator that the chattels were converted, for he never intended any conversion, but intended that the specific legatee should have his farming stock, I ought to refuse the motion to vary the certificate, but without costs. Although the object of the suit is to take away from the specific legatee the proceeds of the property specifically given, yet the question raised is a proper one to be brought before the Court. It has been said that *Taylor* v. *Taylor* does not govern this case; that it does not go so far, inasmuch as although there was an agreement for a sale of the specific things bequeathed, still they existed in the same state as at the death of the testator. But in what respect does that case differ materially from the present? The intention of the testator in this case is clear. The conversion of the stock was inevitable, and I cannot hold that the specific legatee's claim to the proceeds ought to be rejected.

Solicitors for the Plaintiff: Messrs. *Loftus, Vizard, & Anstie,* for Mr. *David Randall, Neath, Glamorganshire.*

Solicitors for the Defendants: Messrs. *Nichols & Clark.*

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5 Eq 117

COTTRELL *v.* COTTRELL.

Sale under Decree—Practice—Parties—Covenant for Title.

On a sale by the Court of real estate vested in trustees whose receipt was declared to be a good discharge, in order to divide the proceeds among the beneficiaries:—

Held, that the beneficiaries were not bound to covenant for title.

The practice of conveyancers of making beneficiaries parties to covenant for title to the extent of their interest in the proceeds, where the receipt of the trustees is declared to be a good discharge, has never been adopted by the Court in sales under its decree.

THOMAS COTTRELL, by his will, dated the 13th of July, 1836, gave certain legacies and an annuity of £100 to his wife. He then gave to his trustees and executors a freehold farm, called *Red Pitts* Farm, on certain trusts; and then, in the event of the decease or second marriage of his wife, upon trust to sell the same and to apply the proceeds among his eleven children. The testator further directed that the receipt or receipts of the acting trustees or trustee for the time being of his will should be a good and sufficient discharge for all moneys which they should be entitled to receive by his will, and which in such receipt or receipts should be expressed or acknowledged to have been received, and that all persons paying any of his said trust-moneys to the acting trustees or trustee of his will, and taking their or his receipt or receipts for the same, should not be afterwards obliged or required to see to the proper application of the said moneys, nor be answerable for the misapplication or non-application of the same. The testator made two codicils to his will, immaterial to the present question, and died on the 15th of June, 1842. His will was proved by some of the executors and trustees. His widow and eleven children survived him, and the widow died on the 28th of March, 1864, without having married again.

The bill was filed on the 11th of April, 1864, for the administration of the testator's estate, and prayed, *inter alia*, that the farm might be sold. On the 4th of June, 1864, a decree was made on the hearing, directing that the farm should be sold, with liberty to

the parties beneficially entitled to bid at the sale. The sale was not necessary for the payment of debts, which had been all satisfied, but was decreed in order to effect a division of the proceeds among the beneficiaries who were entitled to the proceeds of the land when sold.

The *Red Pitts* Farm was offered for sale by public auction at the *Queen's Hotel, Reading*, on the 3rd of April, 1865, but bought in. The conditions of sale contained no restriction as to the parties who should join in the conveyance. On the 28th of June, 1865, Mr. *George Cottrell*, one of the beneficiaries, made a written offer for the estate, through the auctioneers, for the sum of £5500, which, on the 5th of July, 1865, was agreed to be accepted. On the 7th of June, at the instance of the purchaser, an order was made correcting certain omissions, and "allowing the purchaser to pay the whole money into Court, he having accepted the title."

By an order of the 7th of June, 1865, it was "ordered that all proper parties do join in and execute a proper conveyance of the premises to the said *George Cottrell*, or as he should direct, such conveyance to be settled by the Judge in case the parties differ."

The purchaser having insisted on the beneficiaries being parties to grant and convey, as well as to covenant for title, the question was raised in Chambers on a summons before the Chief Clerk, and afterwards before the Vice-Chancellor, who referred it to the conveyancing counsel to settle the conveyance. The conveyancing counsel in settling the draft struck out the grant and conveyance of the estate by the beneficiaries, but settled the draft on the footing that the beneficiaries should covenant for title.

The case then came again before the Chief Clerk, who considered it was not the practice of the Court of Chancery to make the beneficiaries parties to the conveyance, and adjourned the summons into Court.

Mr. *Malins*, Q.C., and Mr. *R. O. Turner*, for the purchaser:—

The Court always regards the practice of conveyancers, which is uniform in requiring the beneficiaries to covenant for title where they have a substantial interest.

But it will be said that the practice of the Court differs in this point from the practice of the profession. The distinction, however,

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does not touch this case. Where the sale is directed by the Court for the payment of debts, or the general purposes of the suit, it is not the practice of the Court to require the beneficiaries to covenant for title; but this is the exception (1). Lord *St. Leonards* says (2):—"Where the money to arise by sale of the estate is absolutely given to two or more persons, they are substantially owners of the estate, and must accordingly covenant for title." Mr. *Dart*, referring to the practice of the profession (3), says:—"The Court would, if the case came before it, sanction such practice by its decision" (4); and Mr. *Davidson* (5) takes the same view.

[The VICE-CHANCELLOR:—Is there any authority for saying that the Court, in a sale ordered by itself, requires the beneficiaries under a will, who are mere volunteers and not contracting parties, to covenant for title?].

The practice has been settled ever since the case of *Loyd* v. *Griffith* (6). In that case the Court directed the master to alter his draft by inserting proper covenants from Mrs. *Webb* against her own acts and the acts of her devisor, as to so much as she would be benefited by the estate devised. The draft at first only contained covenants against the seller's own act. Ever since that case the practice of the profession has been uniformly, in accordance with that of the Court (except where the estate is sold for payment of the debts) to require the beneficiaries to covenant, where they have a substantial interest, to the extent of that interest. In this case the sale was made in order to divide the proceeds among the beneficiaries.

Mr. *Greene*, Q.C., and Mr. *Fooks*, for the Plaintiff, and Mr. *Fielding Nalder*, and Mr. *Swanston*, for other parties, were not called on.

SIR JOHN STUART, V.C.:—

The purchaser has established that, according to the practice of

(1) Sug. V. P. 14th ed. p. 574, pl. 10.
(2) Placitum 11, p. 574—575.
(3) Dart. 3rd ed. 352.
(4) But see *contra*, Prid. Prec. vol. i. 4th ed. 137.
(5) Vol. i. 113.
(6) 3 Atk. 264.

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conveyancers, he would be entitled to covenants for title from the beneficiaries. But it is equally clear that it is an oppressive practice, and has not been adopted by this Court as to sales made under its decree. The beneficiaries under a will are not contracting parties, but mere volunteers; and it seems an arbitrary thing to hold that a legatee is to take nothing from the bounty of the testator until he has entered into covenants for title, and possibly been put to considerable expense. Direct the conveyance to be executed (the beneficiaries not being necessary parties), and tax and pay costs of all parties.

Solicitor for the Plaintiff: Mr. *Joseph Burton.*
Solicitor for the Beneficiary: Mr. *F. B. J. Bryan.*
Solicitors for the Purchasers: Messrs. *White & Son.*

WEEDS *v.* BRISTOW.

V.-C. S. 1866 May 25.

Will—Codicil, Will explained by—Nephews held, under the Circumstances, to include Grandnephews.

Testator gave his residue among his nephews and nieces living at his death, and by a codicil gave £100 to a grandnephew (his executor), whom he called his nephew. By a second codicil, he declared that the £100 was given to him in addition to the share of residue given to him by the will, his intention being that he should receive first the £100 and then the share of residue:—

Held, that all grandnephews and grandnieces who were living at testator's death were included in the gift.

FRANCIS IVES, of *Great Yarmouth,* by his will, dated 15th December, 1859, appointed *John Maddison Bristow* and *John Darnell* his executors, and devised to them his two freehold houses in *Great Yarmouth* on trust for sale, and declared the proceeds of the said houses to be part of his residue, and he gave to his trustees personal estate, and after payment of his just debts, he directed his executors to pay certain legacies. The testator then gave and bequeathed all the residue of his personal estate and effects unto, and to be divided among, all such of his nephews and nieces as should be living at his death, in equal shares.

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The testator made a codicil to his will, dated the 16th of Januar, 1860, giving two pecuniary legacies, but not otherwise altering hi will. On the 6th of December he made a second and third codicil, in the second of which he made the following gift:—"I give to my nephew, *John Maddison Bristow*, £100 out of the produce of my real and personal estate."

The third codicil was as follows:—"I declare that the £100 by the second codicil to my said will given to *John Maddison Bristow* is so given to him in addition to the share of residue given to him by my said will, it being my intention that he shall receive first the said £100, and afterwards, in addition thereto, the said share of residue."

The testator died on the 6th of October, 1864, and his will and the codicils were proved on the 9th of November following.

John Maddison Bristow was a grandnephew of the testator, but claimed to be entitled to a share in the residue. The Plaintiff, a nephew, filed this bill against the executors, alone, to administer the estate; but on the cause coming on to the hearing, his Honour directed the bill to be amended by adding one of the grandnieces to represent the class, and the Defendant, *Susan Bennett*, who was a grandniece, and her husband, were made Defendants.

Mr. *Malins*, Q.C., and Mr. *Taylor*, for the Plaintiff, submitted the point to the Court. It would be for the Plaintiff's interest as a nephew to limit the construction to nephews and nieces; but he had several children, and the result was that to him the construction became immaterial.

Mr. *Hatchard*, for the grandniece and her husband, the *Bennetts*, contended that the testator had himself put his own construction on his language. He first, by his will, gave his residue among his nephews and nieces; then, by his second codicil, he gave to his grandnephew *Bristow*, whom he called his nephew, £100; and by his third codicil he declared that this £100 was given in addition to the share of residue given to him by his will. Therefore it followed that the testator considered *Bristow* as his nephew. But if the class was enlarged as to him, it must be also enlarged as to

the other grandnephews and nieces. The case was well within the authority of *James* v. *Smith* (1).

Mr. *W. R. Fisher*, for *Bristow* and the other trustee, submitted first, that by special words the testator had declared that *Bristow* was to take a share of residue, but he contended that the other grandnephews and nieces were not entitled, merely because of the erroneous reference in the will: *Shelley* v. *Bryer* (2) and *Smith* v. *Lidiard* (3).

Mr. *Hatchard*, in reply, observed that the reasoning in *Shelley* v. *Bryer* (2), viz., that the testator had made a mistake, would not apply to this case.

SIR J. STUART, V.C.:—

The testator has put his own construction on his language, and has made a gift by implication of a share of the residue to his grandnephew; but I think the effect is to let in all the other grandnephews and grandnieces, and there must be a declaration to that effect. There must also be an inquiry who they are.

Solicitor for the Plaintiff: Mr. *Fluker*, for Messrs. *Sole & Gill, Devonport.*

Solicitors for the Defendants: Messrs. *Bird & Moore*, for Messrs. *Lucas & Steward, Great Yarmouth.*

DRUMMOND *v.* DRUMMOND.

Service out of Jurisdiction—Consolidated Order X. r. 7.

The Court has now, under the General Orders, jurisdiction to direct service of its process abroad. The decisions of *Cookney* v. *Anderson* (4) and *Foley* v. *Maillardet* (5) are at variance with the General Orders, which have the force of a statutory enactment.

THIS was a motion to discharge an order dated the 26th March, 1866, made at Chambers. The order was as follows:—

Upon the application of the Plaintiffs, it is ordered that

(1) 14 Sim. 214. (2) Jac. 207. (3) 3 K. & J. 252.
(4) 1 D. J. & S. 365. (5) 1 D. J. & S. 389.

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Plaintiffs be at liberty to serve printed copy of bill, having an endorsement in the form prescribed by Consolidated Order, IX. rule 2, and copy of interrogatories upon the Defendant at *Bonn*, or elsewhere in *Germany*. The order then fixed the time for appearance at twenty-one days after service, and for answer, eight weeks after service of the interrogatories.

The bill was filed by *T. C. W. Drummond* and his wife *Jane*, against the Defendant, *M. P. Drummond*, under the following circumstances. *Jane Drummond*, the Plaintiff, in October, 1840, being then *Jane Drummond Nairne*, married, in *Scotland*, the Defendant, who, the bill alleged, was at that time a domiciled Englishman. At the date of her marriage *Jane Drummond* was apparent or presumptive heiress of her mother, then living, to the entailed lands and estate of *Gairdum*, in *Scotland*, by virtue of a disposition and tailzie made by *Miss Jane Drummond*, dated the 27th June, 1828, and registered at *Edinburgh* on the 13th May, 1829. In 1850, the Defendant and the Plaintiff *Jane*, then his wife, borrowed £600 from the *City of Glasgow Insurance Company*, on giving to the assurance company security on the lands of *Gairdum* for payment of £2175 in the event of her succeeding to the said entailed lands and estate. The security, dated the 11th April, 1850, was briefly as follows: "We, *M. P. Drummond* and Mrs. *J. Drummond*, spouses, considering that I (the wife) am eldest daughter of and heiress of tailzie, next entitled to succeed to the lands of *Gairdum*, have agreed to enter into a transaction with the *City of Glasgow Insurance Company* whereby, on the one hand, the company have agreed to make to us a present payment of £600 sterling, and on the other hand, we are bound to make payment to them of £2175, contingently upon the succession to the said estate of *Gairdum* and others opening to me *Jane Drummond* through survivance of my mother. And now seeing that the company have instantly made payment to us of £600, whereof we acknowledge the receipt. Therefore I, the said *M. P. Drummond*, for myself, and as taking burden on me for my said wife, and I, the said Mrs. *Jane Drummond*, for myself with the consent of my said husband, and we both with joint assent and consent, do hereby bind ourselves, and our heirs, executors, and representatives, whomsoever, all conjunctly and seve-

rally, and renouncing the benefit of discussion, to make payment to the trustees for the time being and their assignees, of the foresaid sum of £2175, at *Edinburgh*, on the day of my succeeding or being in any way entitled to succeed to the entailed estate of *Gairdum*." The deed further provided that the event upon which the said sum of £2175 should become payable, was the mere opening of Mrs. *Drummond's* right of succession.

In the year 1854, a further sum of £1,000 was borrowed from the same company, and secured in the same way. The bill alleged that the Defendant prevailed on the female Plaintiff, his then wife, to join in the security. The security given was dated the 7th April, 1854, and, as the bill alleged, differed but slightly from the former, except that it gave the obligors the option of paying an annuity of £335 19*s.* 9*d.* instead of the principal of £3938.

Both deeds were registered in the General Register of Sasines in *Scotland*, whereby the lands of *Gairdum* became charged with the above-mentioned sums. The bill alleged that the sums of £600 and £1,000, were expended by the Defendant.

On the 6th of June, 1857, the female Plaintiff and the Defendant were divorced for adultery on the part of the wife. There was no issue of the marriage. On the 22nd of December, 1857, the Plaintiffs intermarried.

The bill alleged that the assurance company had required payment of the amount charged on the lands.

The bill charged that, by the law of *Scotland*, when the wife's estate is charged as a security for money borrowed by her husband the wife's estate is considered only as a surety for such debt, and the wife is entitled to have her estate exonerated by her husband; and prayed that the Defendant might be ordered to pay the company the said sums, and to procure the said lands to be released therefrom and the securities to be delivered up to the Plaintiffs.

Both the female Plaintiff and the Defendant, from their marriage till their divorce, were domiciled in *Scotland*, and from that time the Defendant had been domiciled in *Germany*. No property involved in the suit was in *England*. On being served with the bill and the copy of the order, on the 26th of March, 1866, the Defendant obtained leave to enter a conditional appearance, and now moved to discharge the order.

V.-C. S. 1866 DRUMMOND v. DRUMMOND.

Mr. *Malins*, Q.C., and Mr. *W. Pearson*, for the motion, contended that decision of Lord *Westbury* in *Cookney* v. *Anderson* (1), and the decisions in *Foley* v. *Maillardet* (2), and *Samuel* v. *Rogers* (3), had now settled the law by which all subordinate Courts were bound. This was the view taken by Vice-Chancellor *Wood* in *Norris* v. *Cotteril* (4), and *National Provident and Investment Association* v. *Carstairs* (5). It was submitted therefore that the question was concluded by decision.

Mr. *Osborne*, Q.C., and Mr. *J. Pearson*, for the Plaintiffs, said that the decision of Lord *Westbury* took the profession by surprise, and was inconsistent with the practice of the Court and numerous decisions of the Judges. It was inconsistent with the decision of Vice-Chancellor *Wigram* in *Whitmore* v. *Ryan* (6), and with the decision of Vice-Chancellor *Wood* in *Steele* v. *Stuart* (7).

[Mr. *Druce*, as *amicus curiæ*, stated that the order in that case had never been served; the case was subsequently decided in the absence of the parties against whom it had been obtained (8).]

It had been said that the Orders of 1845 had been repealed, and had no longer a statutory authority; but they had been re-enacted under a statutory power, and had the same force as before. It was submitted, therefore, that the order was right, and the motion must be refused.

June 20. SIR J. STUART, V. C.:—

In support of this motion, counsel have properly relied entirely on the authority of the repeated decisions of the late Lord Chancellor. His decisions in the cases of *Cookney* v. *Anderson* and *Foley* v. *Maillardet*, are entitled to all that paramount weight and authority to which the other Judges of this Court are bound to submit.

(1) 31 Beav. 452; S. C. 1 D. J. & S. 365.
(2) 1 D. J. & S. 389.
(3) Ibid 396.
(4) 5 N. R. 215.
(5) 11 W. R. 866.
(6) 4 Hare 612.
(7) 1 H. & M. 793.
(8) Law Rep. 2 Eq. 84.

The ground of these decisions is, that the power of the Legislature is supreme, and that no general order of this Court, and no decision of any of its Judges, can be valid if it exceeds the bounds prescribed by the Legislature. Lord *Westbury* therefore held that the statutory power given to this Court by the Acts of Parliament of 2 Wm. 4, c. 33, and 4 & 5 Wm. 4, c. 82, had not been enlarged by any subsequent statute, and must therefore control the inferior effect and operation of the General Orders of 1860.

It is clear that if he had been aware that there was a subsequent statutory enlargement of the power given to the Court, he would have decided in favour of the validity of that subsequent enlargement, which had the authority of an Act of Parliament. He was not aware that the subsequent statute of 3 & 4 Vict. c. 94, in its first section, enacts that the General Orders of the Court of Chancery, made under its authority, shall, unless objected to within a limited time by a vote of either House of Parliament, "be of like force and effect as if the provisions therein contained had been expressly enacted by Parliament."

Thus the General Order of 1845, made under the authority of this statute, has the same statutory force and effect as if enacted by Parliament, and no decision by the Lord Chancellor, or any other Judge, has any authority against it, although a subsequent General Order having a like statutory authority may repeal or vary, or re-enact it.

When Lord *Westbury* said that the statute 15 & 16 Vict. c. 86, ss. 63 & 64, did not authorize the full force of the General Order of 1860, and that its full operation must be controlled and limited so as not to exceed the limits prescribed by the statutes of Wm. 4, he could not have come to that conclusion if he had been aware that the General Order of 1845 had the force and effect of a statute.

It has, however, been argued now, that the General Order of 1860 has repealed the General Order of 1845. But unless the General Order of 1860 had the force and effect of an Act of Parliament it could not repeal the General Order of 1845, which must in that view be still in force. But in my opinion the statute of 15 & 16 Vict. c. 86, gave full power to repeal the General Order of 1845, and to re-enact it so as that according to the language of

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the statute of 3 & 4 Vict. it has now "the like force and effect as if the provisions therein contained had been expressly enacted by Act of Parliament."

The principle of Lord *Westbury's* decision must be followed; and that principle is, that what has a statutory force and effect must prevail against the most authoritative decision of even the supreme Judge in the Court of Chancery.

Upon the authority of that principle this motion must be refused.

Solicitors for the Plaintiffs: Messrs. *Williams & James.*

Solicitors for the Defendants: Messrs. *Burt & Stevens.*

GEE *v.* LIDDELL.

M. R. 1866 May 31; June 4, 11.

Will—Construction—"Survive"—Remoteness.

The words "survive," and "survivor," import that the person who is to survive must be living at the time of the event which he is to survive. Therefore a gift over in default of children or remoter issue of *A.*, who should survive *A.*:—

Held, not void for remoteness.

THIS was the further consideration of a suit to administer the real and personal estate of *Joseph Gee*.

By his will dated the 8th of May, 1855, the testator devised his real estate, and the residue of his personal estate, to trustees upon certain trusts for his wife for life, and after her decease for his children and remoter issue: but if he should die without leaving any child or children, or remoter issue (which event happened), upon trust that the trustees should pay the annual rents and profits to his nephew, *Thomas Stephen Whitaker*, for life, with a proviso for forfeiture in case of his insolvency or bankruptcy; and after his decease upon trust for all and every the child or children of *Thomas Stephen Whitaker*, who should respectively attain the age of twenty-one years, and their, his and her heirs, executors, administrators and assigns: provided always, that in case any or either of the children of his said nephew should depart this life either in the lifetime of the testator or of his said nephew, or after the respective deceases of the said testator and his said nephew, before he, she, or they should have attained his, her, or their age or respective ages of twenty-one years, leaving lawful issue at his, her, or their decease or respective deceases, then and in such case such issue should (in equal shares and with benefit of survivorship amongst themselves if more than one) have and be entitled to the share of and in the said real and residuary personal estates which the parent or respective parents of such issue would have been entitled to if he, she, or they had survived the said testator, and had lived to attain the age of twenty-one years, whether the same should arise from an original or accruing share, and the same should be paid, con-

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veyed, assigned, or transferred to him, her, or them, as and when he, she, or they should severally attain the age of twenty-one years. But in case any or either of the children of the said testator's said nephew should die in the lifetime of the said testator or of his said nephew, or after their respective deceases, before he, she, or they should have attained the age of twenty-one years, without leaving lawful issue, or leaving such and all such issue should die before he, she, or they should have attained the age of twenty-one years, then and in such case the share or respective shares of the said real and residuary personal estate, whether original or accruing, of such child or children, or his, her, or their issue so dying, should go to and be divided equally amongst the other children of the said testator's said nephew who should be then living, and the lawful issue of such of them as should then be dead, such issue taking and being entitled to take, if more than one, equally between them the share which his, her, or their parent or respective parents would have been entitled to if he, she, or they had survived the said testator and lived to attain the age of twenty-one years, and no more, and the same should be paid, conveyed, and transferred, at the same times and in like manner as his, her, or their original share or shares. And the said testator directed that if there should be no child or children, or remoter issue of his said nephew, *who should survive the testator and his said nephew*, and should live to attain the age of twenty-one years, then and in such case the whole of the said real and residuary personal estate should, after the decease of his said nephew, and such failure of issue as aforesaid, go over and be in trust for his three cousins *George William Moore Liddell*, *William Liddell*, and *Charles Liddell*, their heirs, executors, administrators, and assigns for ever, according to the nature and quality thereof respectively, in equal shares as tenants in common and not as joint tenants.

The testator made two codicils to his will, dated respectively the 3rd of July, 1857, and the 3rd of November, 1859. By the first codicil he gave a legacy of £500 to each of the Plaintiffs: and by the same two codicils he revoked the gift contained in his will of his real and residuary personal estate in favour of his three cousins, the *Liddells*, and made certain dispositions thereof in favour of the Plaintiffs.

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The testator died in 1860, leaving *Thomas Stephen Whitaker* his heir-at-law.

The bill was filed in 1861, against the trustees of the will (two of whom were *George William Moore Liddell* and *William Liddell*), and *Thomas Stephen Whitaker*. A decree was made for the administration of the estate.

At the date of the decree the pecuniary legacies given to the Plaintiffs had not been paid. Provision had now been made for the payment of them: and it was submitted on behalf of *Thomas Stephen Whitaker*, that the gifts of the real and residuary estate contained in the codicil in favour of the Plaintiffs were void for remoteness; that the Plaintiffs had consequently no further interest in the suit, and ought to be dismissed from it.

The argument turned partly on the construction of the gift in the will to the testator's three cousins; partly on the construction of the codicils; but it is considered unnecessary to give a report of the case so far as it relates to the codicils.

Mr. *Baggallay*, Q.C., Mr. *Archibald Smith*, and Mr. *H. M. Jackson*, for the Plaintiffs, contended, that though the gifts in the will in favour of the remoter issue of *Thomas Stephen Whitaker* were too remote, the gift over in favour of the testator's three cousins was not, inasmuch as it was only to take effect if there should be no children or issue who should *survive* the testator and his nephew; and the word survive implied that such children or issue must be alive at the death of the nephew; consequently the gift over would vest upon the death of a person who was alive at the death of the testator. They also objected that it would be premature to make any declaration as to the rights of the Plaintiffs, *Thomas Stephen Whitaker* being still alive.

The *Attorney-General* (Sir *R. Palmer*), and Mr. *F. Waller*, for *Thomas Stephen Whitaker*, contended that "survive" simply meant "be living after," and therefore might include issue born after the death of the nephew, and the gift over would consequently be void; and they pointed out that the construction contended for by the Plaintiffs would defeat the previous gift to the issue of *T. S. Whitaker*.

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Mr. *Selwyn*, Q.C., and Mr. *Rendall*, for the trustees, two of whom took interests under the gift over in the will, adopted the argument of the Plaintiffs on this point.

June 11. LORD ROMILLY, M.R., after stating the effect of the will, continued:—

The gift over is clearly too remote, unless the effect of the word "survive" is to confine the happening of the event on which the gift over is to take effect, to the day of the death of the survivor of the testator and his nephew. It is argued that the word "survive" imports that the person to survive must be living at the death of the person who is to be survived; that it cannot, according to the ordinary import of the words, be said that George III. survived William III.; though it may be said that he survived his father and grandfather. In answer to this it is argued that the meaning of the word "survive" is more extensive, and that here it cannot be so restricted, because, if so, it would defeat the previous gift to the remoter issue of the nephew, which I have read, and which clearly is not confined to children living at the death of the nephew. It is true that this criticism is correct to this extent, that the gift over would, if so construed, have that effect, but I think that this result ought not to induce the Court to give any other than the ordinary meaning to the words used by the testator; and my opinion is, that the meaning of the word "survive" or "survivor" imports, that the person who is to survive must be living at the time of the event which he is to survive. I have consulted *Johnson* and *Richardson*, and the authorities cited by them, and in all instances survive appears to mean to "outlive;" that is, to be alive at the time of a particular event or the death of a particular person, which event or person the other is to survive. It is true that Dr. *Johnson* gives as one of the meanings, "to live after another," but all the passages from the English writers cited, tend to the conclusion that the person who survives an event must be living when that event takes place; and to live after is itself ambiguous, and is not the more ordinary meaning, if construed as contended for by the Defendants.

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I think that in construing wills, words ought to be so construed "*ut res magis valeat quam pereat.*" I think the word "survive" here, properly speaking, imports that the remoter issue of the nephew must be alive at the death of the testator and his nephew, to prevent this gift over from taking effect: and consequently, that the gift over is confined to the contingency which gives effect to its taking place at the death of the survivor of the testator and his nephew, and consequently that it is not too remote, and that on the will alone, if unaffected by the codicils, the gift over to the three cousins, *George Wm. Moore, Wm. Liddell,* and *Charles Liddell,* took effect.

His Lordship then examined the effect of the codicils, and determined that in certain events the Plaintiffs might become entitled to the property, and consequently had a sufficient *locus standi* to maintain and continue the suit; but he refused to make any declaration of right until the event should arise to make this necessary.

Solicitors for the Plaintiffs: Messrs. *Boys & Tweedies,* agents for Messrs. *Day & Wade-Gery, St. Neots.*

Solicitors for *Thomas Stephen Whitaker*: Messrs. *Pearce, Phillips, & Pearce.*

Solicitors for the Trustees: Mr. *Z. Brooke.*

In re MOSS. 35 Beav 529. 12 Jur NS 557.

M. R.
1866
June 2, 4.

Solicitor and Client—Bankruptcy—Delivery up of Papers—Lien.

Where a partner of a trading firm, which had become bankrupt, was also one of the firm of solicitors whom the trading firm had employed in the conduct of suits which were pending at the time of bankruptcy, and the assignees in bankruptcy had retained other solicitors:—

Held, that the assignees in bankruptcy were not entitled to an order for a delivery up to the assignees of the papers in the solicitors' possession subject to their existing lien.

2 Eq 7 Jur NS 108 62 LJ 327 23 LT 91

THIS case came before the Court on an adjourned summons, under the following circumstances:—

Messrs. *Martin Samuelson & Co.,* carried on business at *Hull*

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as ship-builders and engineers; the firm consisted of *Martin Samuelson, Alexander Samuelson,* and *William Henry Moss,* down to the 1st of January, 1863, when *A. Samuelson* retired from the partnership, and the remaining partners carried on the business, of which *M. Samuelson* was principal manager. His partner, *Moss,* was a solicitor, and as such was in partnership with *Francis Lowe,* under the firm of *Moss & Lowe,* at *Hull.*

The firm of *Moss & Lowe* were employed as solicitors for the firm of *M. Samuelson & Co.,* and in the course of such employment various deeds, papers, and documents, belonging to the firm of *M. Samuelson & Co.,* and particularly in relation to several suits, one of which was commenced before the retirement of *A. Samuelson* from the partnership, came into the hands of the firm of *Moss & Lowe,* and their *London* agents, *Ashurst, Morris & Co.*

On the 12th of April, 1865, *M. Samuelson* and *Moss* were adjudicated bankrupts, their firm being at the date of the bankruptcy indebted to the firm of *Moss & Lowe* in a considerable sum.

At the date of the bankruptcy one of the suits against the firm was still pending.

The business of the firm of *Moss & Lowe* was renewed after the bankruptcy, but the assignees of *M. Samuelson* and *Moss* retained *England & Co.,* of *Hull,* as their solicitors.

The present application was made by the assignees and by *A. Samuelson,* that *Moss & Lowe,* and *Ashurst, Morris, & Co.,* might be ordered to deliver up to *England & Co.,* of *Hull,* the solicitors for the applicants, all books, papers, and writings, in their possession as solicitors for *M. Samuelson* and *Moss,* or belonging jointly to them and *A. Samuelson,* particularly such as related to the suits mentioned in the summons, such delivery to be made subject to their lien.

Mr. *Selwyn,* Q.C., and Mr. *Bagshawe,* in support of the application:—

In this case the bankruptcy of the firm of *M. Samuelson & Co.,* in which *Moss* was a partner, made such a change in his position as solicitor, that *Moss & Lowe* can no longer insist on their retainer. It was, in fact, a dissolution of the partnership, and the same rule applies that is laid down by Vice-Chancellor *Wigram*

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in *Griffiths* v. *Griffiths* (1), where the retirement of one of two solicitors from a firm, who were employed in a cause, was held to operate as a discharge of the client, and to entitle him to require that the papers in the cause should be delivered up to his new solicitor upon the usual undertaking for saving the lien of the discharged solicitor. In *Wilson* v. *Emmett* (2), where a solicitor refused to proceed in a cause till a dispute was settled about his remuneration, your Lordship, following a decision of Lord *Cottenham* in *Heslop* v. *Metcalfe* (3), made an order for delivery up of the papers to the new solicitor subject to the existing lien. The fact of *Moss* being in the firm of *M. Samuelson & Co.*, as well as in that of *Moss & Lowe*, cannot affect the general rule, or alter the rights of *A. Samuelson*, or of the assignees. The case of *Scott* v. *Fleming* (4) was even stronger than the present, for there the solicitor to a Plaintiff was imprisoned for debt, and was ordered to deliver up to his successor the proceedings in the case, though he was mortgagee of three-fourths of the fund in question in the suit. The retainer was put an end to both by *Moss* becoming a bankrupt, and by the dissolution of the partnership occasioned by his bankruptcy, and the fact of the firm having resumed business cannot affect the question.

Mr. *Jessel*, Q.C., and Mr. *Macnaghten*, for Messrs. *Moss & Lowe*.

Mr. *Millar*, for Messrs. *Ashurst, Morris, & Co.*

Lord Romilly, M. R. (before calling upon the Respondents), said:—

I think it of great importance to preserve the lien of solicitors. That is the real security for solicitors engaged in business. It is also beneficial to the suitors. It would frequently happen, but for the lien which solicitors have upon papers and deeds, that a client who is not able to advance money to enable them to carry on business would be deprived of justice, through inability to prosecute his claims in the suit, and, therefore, I regard it as a matter of great importance to the due prosecution of rights in Courts of justice to preserve the lien of solicitors.

(1) 2 Hare, 587.
(2) 19 Beav. 233.
(3) 3 My. & Cr. 183.
(4) 9 Jur. 1085.

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There are two cases here. One relates to the old firm—the iron shipbuilding firm, *Samuelson & Moss;* and the other relates to the rights of *A. Samuelson* alone. These cases appear to me to be distinct. As I understand, the firm of *Moss & Lowe* were solicitors for both parties in the concern. This case appears to me to be a new one.

I hold it to be settled by the authorities that if a firm of solicitors becomes bankrupt, the bankruptcy is itself a discharge of the clients who employ them; but I also hold this, which I think is equally clear, that if the client becomes bankrupt, and the assignees do not employ the firm of solicitors, that is a discharge by the client of the solicitors. Now, this case partakes a little of both, and it is singular in that respect. A partnership employs a firm of solicitors, and becomes bankrupt, and the assignees refuse to employ that firm of solicitors. That is a discharge of that firm of solicitors. But there is this complication in the matter, that one of the members of the firm that became bankrupt was also one of the firm of solicitors. The firm of solicitors has not become bankrupt *quâ* firm, because the firm of solicitors is perfectly solvent, and the surviving or remaining partner in that firm carries on business just as he did before, there being no claim against that firm. The firm that employed him has become bankrupt. I am not disposed to carry the rule with respect to the discharge further than has been done before. I think, as this is a case where the firm that employed the solicitors became bankrupt —that is, the client became bankrupt—and as it was only through their bankruptcy that the firm of solicitors was affected, that I cannot apply those authorities which decide that the case is one where the solicitor has discharged the client, and I cannot make the order for the delivery up of the papers belonging to the firm which has become bankrupt.

The case of *Alexander Samuelson* is quite distinct; and I want to hear Mr. *Jessel* upon the point why the firm should not deliver to *Alexander Samuelson* the papers to which he is individually entitled. He is entitled to have their bills from them; but *Alexander Samuelson*, upon their doing that, must enter into a personal undertaking by himself to pay what shall be found due on taxation in respect of their bill of costs up to the 1st of January, 1863.

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Mr. *Jessel*, for Messrs. *Moss & Lowe*, consented to deliver the papers to *Alexander Samuelson*, on his giving a personal undertaking to pay their bill of costs.

Mr. *Bagshawe*:—

Mr. *Alexander Samuelson* will give no undertaking.

Lord Romilly, M. R.:—

Then the summons is dismissed. I shall let the respondents have all their costs of this application. The applicants will get their costs out of the estate.

Solicitors for the Applicants: Messrs. *Few & Co.*, agents for Messrs. *England & Co., Hull.*

Solicitors for the Respondents: Messrs. *Ashurst, Morris, & Co.*, agents for Messrs. *Moss & Lowe, Hull.*

In re PATENT CARRIAGE COMPANY.

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June 11, 12.

GORE & DURANT'S CASE.

Company—Contract—Payment in Shares—Vendor's Lien—Winding-up—Contributory.

4 Ch. D. 364

Two persons agreed to sell certain property to a company for a price to be paid, part in fully paid-up shares, part in shares partly paid-up, and the remainder in cash, as and when the company should receive any money in respect of shares subscribed for over and above the first £1000; and it was provided that if the shares and cash should not be paid within two years from the date of the agreement, the agreement should be void, and that any monies and shares paid thereunder should be retained as liquidated damages for breach of the agreement. The shares were issued to the vendors and their nominees, but the event on which the cash was to be paid never happened, and the company was wound up within two years from the date of the agreement:—

Held, that the vendors must be placed on the list of contributories in respect of their shares; but that they were entitled to a lien on the property sold for the amount of cash which had not been paid.

THE *Patent Carriage Company, Limited*, was incorporated in March, 1864. The capital was divided into shares of £10 each.

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By articles of agreement, dated the 14th of April, 1864, and made between Messrs *Gore & Durant* of the one part, and the company of the other part, the company agreed to purchase, and *Gore & Durant* to sell, all the interest of *Gore & Durant* in certain letters-patent therein mentioned (being for improvements in the construction of cabs and carriages), so far as related to the use of the invention in *England*, at the price of £20,000; and it was agreed that £13,500, part thereof, should forthwith be paid to *Gore & Durant* in shares of the company, on 500 of which £10 each should have been fully paid up, and on 1700 of which £5 each should have been paid; that the company should pay the balance of £6500 in cash as and when the company should receive any money from payments on shares subscribed in the capital of the company, after the first £1000 should have been paid in to the company's bankers, in the proportion of one-third of all such cash; and that when and so soon as £3000, part of the £6500, should have been paid, *Gore & Durant* should execute a proper assignment of the patents to the company. And it was also agreed that if the said sums of £6500 and £13,500 worth of fully (1) paid-up shares should not be fully paid and satisfied within the space of twenty-four calendar months from the date thereof, then the articles of agreement, and the agreement for assignment therein contained, should be utterly void and of none effect, and all monies and shares so paid thereunder should be forfeited to and retained by *Gore & Durant*, by way of liquidated damages for the breach of the agreement by the company.

The 500 fully paid-up shares were issued to *Gore & Durant*: the remaining 1700 shares were issued partly to them, and partly to their nominees: and they and their nominees were duly placed on the register of shareholders in respect of the shares. No part of the £6500 cash was paid, in consequence of the company never having received £1000 on shares subscribed for. On the 1st of July, 1865, an order was made for winding-up the company.

Under these circumstances *Gore & Durant* were desirous to return the shares allotted to them and their nominees, and to retain their patents, which had never been assigned; the official

(1) *Sic.*

liquidator, on the other hand, desired to place them on the list of contributories, in respect of the shares standing in their names. The matters in dispute were now brought before the court, upon a statement of facts agreed to by all parties. No question was raised as to the shares standing in the names of the nominees of *Gore & Durant.*

Mr. *Jessel,* Q.C., & Mr. *Cottrell,* for the official liquidator :—

Messrs. *Gore & Durant* took the shares as part of the price paid to them for the patents, they have been put on the register of shareholders, and they cannot now repudiate the contract.

Mr. *Southgate,* Q.C., for *Durant,* and Mr. *Baggallay,* Q.C., for *Gore* :—

The consideration for which Messrs. *Durant & Gore* agreed to sell their invention has failed: they have never parted with their property at law, and they are entitled to retain it. The contract has never been completed, and it is impossible to make them contributories in respect of the shares: *Coleman's Case* (1).

Mr. *Jessel,* in reply :—

To relieve these gentlemen from being contributories would be to rescind the contract, which the court has no power to do. *Coleman's Case* is distinguishable: there *Coleman* insisted on having his name removed from the register before the winding-up order was made.

June 12. LORD ROMILLY, M.R. :—

In this case I do not think it is possible to comply with the request made by Messrs. *Gore & Durant* that I should relieve them from being placed on the list of contributories. In fact they have entered into a valid agreement to sell certain property for £6500 in money, 500 fully paid-up shares, and 1700 shares on which £5 has been paid up. Now all has come to a close: but I cannot set aside the contract; neither can I give one side all the benefit of it while I give none to the other. I must therefore declare these gentlemen to be contributories; but in respect of

(1) 1 D. J. & S. 495.

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the £6500 they are entitled to a first charge on the property sold to the company; for though that sum was not to be paid except on an event which cannot now happen, I must carry out the contract as nearly as I can, and that is by giving them a lien for the unpaid purchase money on the property sold by them to the company.

Solicitors for the Official Liquidator: Messrs. *G. S. & H. Brandon.*

Solicitors for Messrs. *Gore & Durant:* Messrs. *Stephens & Matthews.*

M. R. 1866. *May* 23; *June* 1.

DENTON *v.* MACNEIL.

35 Beav. 652.

Fraud—Misrepresentation—Company—Prospectus—Contribution.—7 & 8 *Vict. c.* 110—*Provisional Registration.*

A contract to take shares in a company cannot be set aside because it was founded on a prospectus which contains exaggerated views of the advantages of the company, but does not contain any material misstatement of fact.

Where, therefore, a prospectus stated that a certain invention which it was the object of the company to work had been tested, and that according to the experiments the material could be produced at a specified cost, but that it was intended to test the invention further, and the invention turned out worthless, and it appearing that there had been some testing:—

Held, that this was not such a misrepresentation as would enable a purchaser of shares to set aside the contract.

A person who has taken shares in a company which was provisionally registered only under the Act of 1844, and paid deposits thereon, cannot recover the deposit by a suit in equity, but must bring an action at law.

One of the promoters of a company cannot maintain a suit against his fellow promoters for contribution towards expenses incurred by him in promoting the company, unless he is willing that an account should be taken of the expenses incurred by all the promoters.

IN May, 1855, it was proposed to form a company, to be called *The British Slag Company*, for the purpose of working two patents, taken out in the name of a Dr. *Smith*, for converting slag, scoriæ, and other refuse obtained from the smelting of metals, into a material of the nature of marble, and suitable for making pavements, ornaments for fireplaces, and the like. The proposed company was provisionally registered under the *Joint Stock Companies*

Act of 1844. In July, 1855, a prospectus was issued, which, after stating the names of the trustees and the directors, and of the solicitors, secretary, bankers, and brokers of the company, and the nature of the invention which it was the object of the company to work, contained the following paragraphs:—

"This important invention has been patented by Dr. *Smith* in *Great Britain*, whose rights therein have been purchased by this company for a fixed sum, the payment of which entirely depends on the complete success of such further testing as hereinafter referred to." . . . . .

"The practical working of the invention has been tested with a view to ascertain the necessary capital required for the cost of construction and machinery, and for the cost of production of the material.

The cost of the article in its rough moulded state, as applicable to general building purposes, will, at the place of manufacture, not exceed 10*s.* per ton, so far as the testing which has taken place will permit the directors to judge; but before any large outlay is made, they propose erecting limited works at first, which will enable them to say with perfect certainty the exact cost."

Upon the faith of the statements contained in this prospectus the Plaintiff applied for shares in the company, and in October, 1855, 200 shares were allotted to him, on which he paid a deposit of £200. Subsequently the promoters of the company became desirous that it should be registered with limited liability under the *Joint Stock Companies Act*, 1856; and in June, 1856, a second prospectus was issued, containing similar statements to those in the first, and also stating that it was proposed to bring the company under the protection of the Act of 1856.

In 1857, the promoters commenced operations at the *Maesteg Iron Works*, in *Glamorganshire*. The first experiments were unsuccessful; and in January, 1858, the Plaintiff offered to undertake the superintendence of the works, and also, upon certain conditions, to make the necessary advances for carrying them on, until a sufficient amount of capital should be called up. This offer was accepted by the directors, and they agreed to pay him £400 per annum as remuneration for his services. The Plaintiff ac-

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cordingly went to the *Maesteg Iron Works*, and continued there until April, 1860; and, in the interval, expended considerable sums in attempting to work the patents. The patents, however, proved to be worthless, and the undertaking was abandoned early in 1860, the company never having been registered under the Act of 1856.

The Plaintiff never received any part of the salary promised to him as remuneration for his services in managing the Company's works.

In December, 1863, the Plaintiff filed this bill against the directors, the solicitors, and the secretary of the company, and the company itself. It alleged that the prospectus contained fraudulent misrepresentations; and in particular that the statements as to the purchase of the patents, and as to the testing of the invention, were untrue. It prayed, amongst other things, that an account might be taken of all monies paid and advanced by the Plaintiff in respect of his shares, and of all monies paid and advanced by the Plaintiff on behalf of the company: that an account might be taken of what was due to the Plaintiff for his services in managing the company's works: that it might be declared that the Defendants, the promoters, were jointly and severally liable to make good to the Plaintiff what, upon taking the said accounts, might be found due to him: and that the Defendants (other than the secretary) might be ordered to pay the same to the Plaintiff: and that if the promoters were not liable to recoup to the Plaintiff the whole amount of the monies advanced by him for works, then that it might be declared that they were liable to contribute thereto in such proportions as the Court might deem just. The cause now came on to be heard. Some of the Defendants were out of the jurisdiction, and by leave of the Court replication was filed against such of them as were within it.

The Defendants by their answers stated that the promoters of the company had agreed with the patentee for the purchase of his invention previously to the issuing of the first prospectus; but apparently the agreement was not reduced to writing till September, 1856.

It also appeared that the invention had been tested to some extent before the prospectus was issued; and upon the occasion of a visit which the Plaintiff made to the offices of the company

before he applied for shares he was shewn some tiles which had been produced by the patented process.

Mr. *Locock Webb*, and Mr. *Horsey*, for the Plaintiff, submitted that the misrepresentations in the prospectus were such as to entitle the Plaintiff to a decree: *Pulsford* v. *Richards* (1), *Colt* v. *Woollaston* (2), *Evans* v. *Bicknell* (3); and as to the right to contribution, they cited *Cooper* v. *Webb* (4).

Mr. *Selwyn*, Q.C., Mr. *Baggallay*, Q.C., Mr. *E. K. Karslake*, Mr. *W. R. Ellis*, Mr. *Macnaghten*, Mr. *Eddis*, Mr. *W. W. Mackeson*, and Mr. *J. N. Higgins*, for the various Defendants, were not called upon.

June 1. LORD ROMILLY, M.R.:—

In this case I think the Plaintiff fails. I have gone through the papers very carefully, and I do not think that I can require the Defendants to be heard before me on the subject. [After stating the facts as to the formation of the company and the prospectus, His Lordship continued:] The first complaint of the Plaintiff is, that he was misled by statements in the prospectus of the company, which were false and fraudulent. First, they speak of the testing of the invention, whereas he says that in point of fact the invention was not properly and sufficiently tested. But the truth is, that the prospectus itself says that a more complete and perfect testing is contemplated, and the promoters invite everybody to look at their works for the purpose of seeing whether the testing is sufficiently made or not. I adopt as to this the observations of Lord Justice *Turner* in the case of *Kisch* v. *The Central Railway of Venezuela* (5), in which he states that anybody who looks at a prospectus understands that the thing is coloured, in this sense, that everything is put forward in the most favourable view it can be. Now, that does not justify the stating a thing that is totally false, and I am of opinion that if a material statement is made which is

(1) 17 Beav. 87. 17 Jun 866
(2) 2 P. Wms. 154.
(3) 6 Ves. 183.
(4) 15 Sim. 454.
(5) 34 L. J. (Ch.) 545. 11 Jun H.L. 646, -8, 3 Eq 746 S. 12

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untrue, upon the faith of which a person takes shares, he is entitled afterwards to come to the company and require those shares to be cancelled, and the payment he has made on them returned to him. But I do not think that the inaccuracy of the statement upon this prospectus is sufficient for that purpose. It speaks of the testing, but they had tested the invention to a certain extent, and there is no question but that all the persons who endeavoured to establish this company acted *bonâ fide*, and believed that they could establish a real profitable concern. Another answer to this complaint is, that in point of fact the intended company has never been established, and that there are no shares to be returned. There were shares in a company which had been provisionally registered; but which company does not exist, as the promoters found they could not carry it into effect. It also appears that the Plaintiff proposed in January, 1858, that he should go down and superintend the management of the great oven, at a place called *Maesteg*, in *Glamorganshire;* and, accordingly, there was a meeting of the directors on the 30th of January, for the purpose of taking this proposal into consideration, and having done so, they determined that he should go down. He must have seen very soon what was the state of affairs, but he took no step whatever in the matter in 1858; and this bill is not filed until quite the end of the year 1863, that is, there were nearly six years from the time that he first went down to superintend this establishment to the time of the filing of the bill. Therefore, in my opinion, he fails in that respect, because on a claim to have shares in a company returned he must make out a case of having been fraudulently deceived, and also of having sought redress within a reasonable time, which, in my opinion, he does not do. As the shares in point of fact do not exist, all he could require would be the repayment of his deposit; for which purpose the proper mode would have been by an action at law, which he could have maintained, supposing that he has merits in the case. It is not necessary to refer to the other ground of complaint as to the prospectus, because what I have stated about the first point strictly applies to this also.

It is possible that the Plaintiff might have been entitled to some remuneration from the directors for the superintendence

which he gave to the affairs of the incipient company in 1858, and accordingly he does state something to that effect, but if so, that would probably be recoverable in an action at law, because, if at all, it would be upon an implied assumpsit on the agreement between them on which he would be entitled to such remuneration.

The only other ground on which, in my opinion, it would have been possible for the Plaintiff to maintain his suit is this—he might say, I was one of several persons who endeavoured to form a company, and for that purpose we paid a great deal of money; it was for our common benefit, it was a joint concern in which we were partners, although, in fact, for a purpose that failed, and I have paid more than my share; you are therefore bound to repay me what I have overpaid for the purpose; that is to say, we endeavoured to produce a certain work, we were, so to speak, tenants in common or jointly interested in the affair, and we ought to bear the liabilities jointly between us. But on looking at the bill I find that there is no case made of that description. It is true there is a paragraph in the prayer of the bill to this effect —That if the Court should be of opinion that the Defendants, the promoters, are not liable to recoup to the Plaintiff the whole amount of the moneys advanced by him for works as aforesaid, then that it may be declared that they are liable to contribute thereto in such proportions as the Court may deem just. But that is with respect to the works only; and if the Plaintiff claimed anything on this footing, he should put it upon the ground that all the expenses of every sort and description of this concern (not the mere transaction in which he was engaged in superintending the works) ought to be borne *pari passu* by every body concerned. It appears there were considerable expenses of that description. In the first place many persons applied for shares and paid their deposits. It appears from the evidence, to what extent I cannot now accurately make out, that the directors have been compelled to repay to these persons their deposits. That was not done without some expense; and there were the expenses of the office and the like, all of which would be included in the account; but all the Plaintiff proposes is, that he shall be repaid what he has spent, or contribution made

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for that purpose, not that all the expenses shall be thrown into one common fund, with an offer to pay what, if anything, may be found due from him on taking that account, which possibly might turn out against him. That being my view of the case, I think the Plaintiff's case fails; that if he has any remedy it is at law, and that he cannot come into equity on a bill framed as this is; and I am of opinion, therefore, that the bill should be dismissed.

It is proper I should state that I have gone into this case upon the merits, because I was desirous to do what I could to settle the question between the parties, and to avoid further expense and delay, but I am also of opinion that if my judgment upon the facts which appear in the evidence had been in favour of the Plaintiff, I could not have made any decree in the present state of the cause; but that I must have directed it to stand over for the purpose of enabling him to bring before this Court those Defendants who are out of the jurisdiction, and have not been served with process in this suit.

Solicitor for the Plaintiff: Mr. *H. Wickens.*

Solicitors for the Defendants: Mr. *J. J. Darley;* Messrs. *Matthews & Bell;* Messrs. *Hargrove, Fowler, & Blunt;* Messrs. *Flux & Argles;* Mr. *W. W. Fisher;* Messrs. *Roy & Cartwright.*

M. R. 1866 *June 7.*

GARRETT *v.* SALISBURY AND DORSET JUNCTION RAILWAY COMPANY.

Railway Company—Contractor—Contract for Works—Forfeiture of Plant.

An agreement between a railway company and a contractor provided, that in case the contractor should be guilty of any delay or default in the fulfilment of the contract, the company might take the execution of the works out of his hand, and might use all or any of his plant, materials, or implements: and that in addition to all other rights and remedies which the company might have against the contractor, the company might apply any moneys to which the contractor would otherwise be entitled under his contract towards satisfaction of all losses or expenses occasioned to the company by the delay: and that all the materials, plant, and implements, which at the time of such delay or default should be in or about the site of the works, should thereupon become

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the absolute property of the company, and be valued or sold, and the amount of such valuation or sale credited to the contractor in reduction of the moneys (if any) recoverable from him by the company.

The company took the execution out of the contractor's hand under this clause. The contractor brought an action for breach of contract, which with all matters in difference between the parties was referred to arbitration:—

Held, that the plant and materials did not become the absolute property of the company unless loss or expense had been occasioned to them; and an interlocutory injunction was awarded to restrain them from removing and selling the plant and materials pending the arbitration.

THE Plaintiff, a railway contractor, by contract, dated the 19th of February, 1864, agreed with the Defendants, the *Salisbury and Dorset Junction Railway Company*, to construct their line of railway. The 31st clause of the contract was as follows:—

"If the contractor before the complete fulfilment of the contract become insolvent or bankrupt, or be guilty of any delay or default in the fulfilment thereof, and his delay or default shall continue for fourteen days or more next after notice in writing from the company's engineer-in-chief requiring him to proceed duly with the fulfilment of this contract, the company may take the further execution of the works out of the hands of the contractor, and thenceforth may, at the cost of the contractor, execute the works, or procure any other person or persons to execute the same, or any part thereof, and may use or authorize the use of all or any of the materials, plant, and implements provided by the contractor of the works or any of them; and the company shall not be barred or prejudiced by so doing from any right or remedy against the contractor, his executors, or administrators, for recovery of special damages for his breach of contract or otherwise; but in addition to all such rights and remedies, the company may apply any moneys to which the contractor would otherwise be entitled under his contract in or towards satisfaction of all losses or expenses to the company occasioned by reason of such bankruptcy or insolvency, delay or default; and all the materials, plant, and implements which at the time of such bankruptcy or insolvency, delay or default, shall be in, upon, or about the site of the works, shall thereupon become the absolute property of the company, and the whole thereof shall be valued or sold, and the amount of such valuation or sale shall be credited to the contractor in reduction of the moneys recoverable from him for

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the company (if any shall be so recoverable); and the contractor shall not in any manner molest, disturb, or hinder the company, or any person engaged by or for them, in the execution of the works, or in using for that purpose any materials, plant, or implements theretofore belonging to the contractor, but the company shall not be bound to use the materials, plant, or implements."

Under the power reserved by this clause, the company, in October, 1864, took the execution of the works from the Plaintiff, and employed another contractor, the Defendant *Henry Jackson*, to complete the line; and the Defendants took possession of and used the Plaintiff's plant and materials. The Plaintiff thereupon filed a bill before Vice-Chancellor *Wood* against the company and *Jackson*, and thereby, amongst other things, prayed that the Defendants might be restrained from interfering with him in the execution of the contract, and from continuing in possession of, removing, or selling, his plant and materials. A motion was made for an injunction, in terms of the prayer of this bill, on the 26th of July, 1865, but was refused. No further proceedings had been taken in the suit. In August, 1865, the Plaintiff commenced an action against the company for breach of the contract. This action, and all matters in difference between the parties, were referred to an arbitration, which was still pending. The value of the Plaintiff's plant and materials was a matter in dispute in the arbitration: the Defendants contending that these were worth only about one-third of the value put on them by the Plaintiff.

The line was now nearly completed, and the Defendants had begun to remove some of the plant and materials. The Plaintiff thereupon filed the bill in this suit, praying that the company and *Jackson* might be restrained from removing any of the plant, materials, or implements of the Plaintiff until the arbitrator should have made his final award in the action referred to him.

Mr. *Jessel*, Q.C., and Mr. *E. W. Stock*, now moved for an injunction accordingly.

Mr. *Selwyn*, Q.C., and Mr. *Townsend*, for the company:—

Upon the true construction of the contract the plant and mate-

rials have become the absolute property of the company. The value of them forms an item in the account before the arbitrator, and he has ample jurisdiction to deal with it. Whatever relief the Court may give the Plaintiff at the hearing, it will not interfere by way of interlocutory injunction: *Garrett* v. *Banstead & Epsom Downs Railway Company* (1), *Munro* v. *Wivenhoe Railway Company* (2), *Waring* v. *Manchester & Sheffield Railway Company* (3). Even if the Court will interfere, relief might have been obtained in the suit still pending before Vice-Chancellor *Wood*: and the Defendants ought not to have been harassed by a second suit.

Mr. *Baggallay*, Q.C., and Mr. *Fitzhugh*, for *Jackson*.

LORD ROMILLY, M. R.:—

An injunction must be granted in this case. The cases cited against the Plaintiff are, in my opinion, in every respect in his favour, unless they be construed as authority for the doctrine that the Court will never interfere by interlocutory injunction between a railway company and a contractor. But if the Court may interfere to protect property intended to be removed, to the prejudice of the person applying, and for the benefit of the person about to remove it, these cases are no authority on the present occasion; they are simply authorities that the Court will not upon an interlocutory application prejudice the decision of the questions between the parties.

In this case, if the company establish that they are creditors of the Plaintiff, they will be entitled to all the plant and materials in question; but if, on the other hand, the Plaintiff establish that he is a creditor of the company, he will be entitled to have all his property back again. The contract provides that if the contractor be guilty of delay, the company is entitled to take possession, and to complete the works, and for that purpose to use his plant and materials. I hold it to be established, or, at all events, I will assume, that the contractor has been guilty of delay, and therefore the company is entitled to *use* the plant and materials. Then it is said that the company has become entitled absolutely

(1) 11 Jur. (N. S.) 591.
(2) 11 Jur. (N. S.) 612.
(3) 7 Hare, 482; 2 H. & T. 239.

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to the plant and materials, and may take them at a valuation, and allow that in account with the contractor. But if that be the true construction of the contract, what reason was there for giving the company power to use what was already their property, which consequently they had every right to use? Indeed, unless it had been so perseveringly urged upon me by the counsel for the Defendants, I should have supposed it to be clear that the company were only to take the plant and materials in satisfaction of losses incurred by the company. The contract is that the company may use the plant; that they may come against the contractor for special damage; and, in addition, that they may apply all moneys to which the contractor might otherwise have been entitled towards satisfaction of any losses or expenses occasioned to the company; "and all the materials, plant, and implements which at the time of such bankruptcy or insolvency, delay or default, shall be in or about the site of the works, shall thereupon become the absolute property of the company;" that is, in satisfaction of the losses or expenses occasioned to the company. Unless it were so, it would be unnecessary to provide that the company might use the plant.

It must, therefore, be established that the company have incurred losses and expenses before they become entitled to the plant and materials. That has not been done; the account is still going on, and the Court will not prejudge the case. But it would not be just to allow the Defendants, who set a value on the plant of only about one-third of what the Plaintiff claims, to remove the property, and allow the Plaintiff the value on account. Either the Defendants must pay into Court the amount of a price agreed upon between them and the Plaintiff, or an injunction must be awarded to restrain them from removing the Plaintiff's plant and materials, except in so far as may be necessary for opening the line.

Solicitor for the Plaintiff: Mr. *Vaughan Prance.*
Solicitor for the Company: Mr. *G. B. Townsend.*
Solicitor for *Jackson:* Mr. *S. C. Frankish.*

In re HELLMANN'S WILL.

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1866
May 2.

Practice—Infant's Legacy—Foreign Domicil—Payment.

A legacy bequeathed to an infant domiciled abroad, may be paid when the infant comes of age by the law of *England*, or of the place of domicil, whichever first happens; and in the meantime must be dealt with in the usual way as an infant's legacy, although by the law of the place of domicil the guardian of the infant may be entitled to receive the legacy.

CHRISTIAN HELLMANN, being domiciled in *England*, by his will bequeathed the sum of £250 to each of the two children of *Charlotte Helsig*. These children were a daughter, aged eighteen, and a son, aged seventeen, both resident and domiciled in *Hamburg*.

According to the law of *Hamburg*, girls become of age on completing their eighteenth year; boys, on completing their twenty-second. By the same law the father of an infant is entitled, as guardian, to receive a legacy bequeathed to the infant.

Under these circumstances the executors applied, under the Acts 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 38, for the direction of the Court as to the payment of the legacies.

Mr. *Vaughan Hawkins*, for the executors.

LORD ROMILLY, M. R.:—

I am of opinion that the legacy to the daughter, who is of age according to the law of *Hamburg*, may be paid to her on her own receipt. The legacy to the son may be paid to him on his attaining full age according to English law or according to the law of *Hamburg*, whichever first happens; in the meantime it must be dealt with in the usual way as an infant's legacy.

Solicitors: Messrs. *Freshfields & Newman.*

Butler v. Brown, 13 W.R. 677 V.C.W.

M. R.
1866
June 9.

Ex parte STOCKSBRIDGE RAILWAY BILL.

Practice—Parliamentary Deposit—Certificate of Deputy Speaker—9 & 10 Vict. c. 20, s. 5.

9 C.B. 708

An order can be made for the return of a Parliamentary deposit on the withdrawal of a railway bill, under the 9 & 10 Vict. c. 20, s. 5, upon production of a certificate signed by the Deputy Speaker of the House of Commons in the Speaker's absence.

IN this case an order had been made on petition, under 9 & 10 Vict. c. 20, s. 5, for the return of the parliamentary deposit paid in respect of the *Stocksbridge Railway Bill*, that bill having been withdrawn.

A certificate of the 16th of March last, stating that the bill had been finally withdrawn for the present session, was produced to the Registrar. This was signed "*John George Dodson*, Deputy Speaker."

It appeared that the certificate was signed by Mr. *Dodson*, the Chairman of the Committee of Ways and Means, while he was acting as Deputy Speaker during the absence from illness of the Speaker of the House of Commons; but this was not proved in evidence.

By the Act of 9 & 10 Vict. c. 20, s. 5, it is provided that no such order for the repayment of the sum deposited shall be made "unless upon the production of the certificate of the Speaker of the House of Commons, with reference to any proceeding in the House of Commons, that the bill was rejected or withdrawn, or was not presented, or that such Act was passed."

The Registrar thought that the certificate of the Deputy Speaker was insufficient, and that the Court could not take notice of the Standing Orders of the House of Commons with reference to the Deputy Speaker.

The Standing Orders of the House of Commons, of the 20th of July, 1855, provide that, "in the event of the unavoidable absence of the Speaker, the Chairman of the Committee of Ways and Means may perform the duties and exercise the authority of the

Speaker in relation to all proceedings of the House as Deputy Speaker."

Mr. *Russell Roberts*, for the Plaintiffs, now submitted the question of the sufficiency of the certificate for the opinion of the Court.

LORD ROMILLY, M. R., considered that, having regard to the Standing Orders of the House of Commons, of which the Court could take notice, the certificate of the Deputy Speaker was equivalent to that of the Speaker, and the Order could be regularly made.

Solicitors: Messrs. *Johnson & Weatheralls.*

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1866

June 2.

BANK OF TURKEY *v.* OTTOMAN COMPANY.

Injunction—Company—Jurisdiction—Payment into Court—Promotion Money.

In a suit on behalf of *Company A.*, praying relief on the footing that a payment for promotion money made by their directors to *Company B.*, was a breach of trust, the Court refused to restrain *Company B.* (which was a limited company being voluntarily wound up) by interlocutory injunction from dealing with the money or dissolving the company: the right to such money being the question to be decided at the hearing, and there being no admission of a trust so as to entitle the Plaintiffs to an order for payment of the money into Court.

MOTION by Plaintiffs, "The *Bank of Turkey, Limited*, now in course of being wound up at 13, *Gresham Street*," for an injunction to restrain the Defendants, The *Ottoman Company, Limited*, from withdrawing a sum of £5000 from their account with the *London and Westminster Bank*, and from parting with or disposing of such sum or any part thereof, and also to restrain the Defendant company from parting with their assets, and from dissolving the company without first paying or making provision for the repayment of the £5000 with interest.

According to the statements of the bill the *Bank of Turkey, Limited*, was formed in October, 1865, having been projected by certain of the directors of a company, formed in April, 1862, and called the *Ottoman Company, Limited;* the prospectus of the *Bank of Turkey* being thus headed—"The *Ottoman Company, Limited*, invite applications for the capital of the *Bank of Turkey, Limited.*"

The Defendants, *Farley, Palmer*, and *Barnes*, were directors both of the *Ottoman Company* and also of the *Bank of Turkey*, and the two companies had the same secretary.

The articles of association of the *Bank of Turkey* contained the following clause:—

"In their management of the business of the company the directors, without any further power or authority from the shareholders, may do the following things, viz.:—They may and shall pay out of the funds of the company such sums as they shall think proper to be paid in satisfaction for all costs, charges,

Bill dismissed with costs 4 W. R. 37

and expenses not hereinbefore provided for, and which shall have been or shall be hereafter incurred or sustained in or about the formation and establishment of the company, or the obtaining the capital, or in any other matter in relation thereto; and they may appropriate and pay such reasonable amounts by way of commission, or otherwise, as they may think fit, to any person or persons in respect of any services performed, or benefits derived by or through such person or persons, in relation to the formation or bringing out of the company."

According to the allegations of the bill a secret arrangement was made between the Defendants, who were directors of both companies, that the *Bank of Turkey* should pay £5000 to the *Ottoman Company* as promotion money, or "in consideration of being introduced to the public." In December, 1865, pursuant to a resolution of the directors, a cheque for £5000, in consideration of services alleged to have been rendered by that company in recommending the *Bank of Turkey* to the public, was delivered to the *Ottoman Company*, and paid out of the funds of the *Bank of Turkey*. The bill alleged that the £5000 was paid without any consideration by the influence of *Farley*, *Palmer*, and *Barnes*, not for the purpose of *bonâ fide* promoting the interests of the bank, but in order to benefit the *Ottoman Company* and the above-named Defendants personally. The payment of the £5000 was never communicated to the shareholders, and was not known to them until April 1866, when the bank, which had never commenced business, was voluntarily wound up. The bill alleged that under the circumstances this payment was not warranted by the articles of association, and was a breach of trust on the part of the directors of the bank, of which the *Ottoman Company* had full notice. The *Ottoman Company*, as well as the bank, were being voluntarily wound up, and a circular had been recently published by the *Ottoman Company*, stating that "arrangements are in progress for the establishment in *Turkey* of a powerful company, embracing the objects of the *Ottoman Company*, but having a more extended organization."

The bill, which alleged that the *Ottoman Company* were about to transfer their assets and the £5000 to *Turkey*, and that it was intended by the shareholders to dissolve the company without providing for repayment of the £5000, which was in imminent danger of being lost, prayed a declaration that the payment of the

V.-C. W. 1866 BANK OF TURKEY v. OTTOMAN COMPANY.

£5000 to the *Ottoman Company* was a breach of trust, and that the Defendants, *Farley*, *Palmer*, and *Lewis*, were jointly and severally liable to repay such sum to the Plaintiffs, and also prayed an injunction against any transfer of the £5000, in the terms above stated.

Mr. *Rolt*, Q.C., and Mr. *Lindley*, for the Plaintiffs, in support of the motion:—

The payment of the £5000 was unauthorized, and a breach of trust on the part of the Defendants, the directors, and the Plaintiffs are entitled to follow the money, which is ear-marked, and affected with a trust in their favour, into the hands of the *Ottoman Company*, who took it with notice of the trust. The fact that this money has been mixed with other moneys belonging to the *Ottoman Company* is no answer to the claim of the Plaintiffs, who are entitled to an injunction in the meantime to restrain the Defendants from parting with the subject matter of the suit, and the more so as the Defendants (a limited company) are now being voluntarily wound up; and if this money is allowed to be sent out of the country the Plaintiffs will be left without remedy. They cited *Pennell* v. *Deffell* (1); *Ernest* v. *Croysdill* (2); *Frith* v. *Cartland* (3); *In re Haytor Granite Company* (4).

Mr. *W. M. James*, Q.C., Mr. *Roxburgh*, and Mr. *A. E. Miller*, for the Defendants, were not called upon.

SIR W. PAGE WOOD, V.C.:—

There has been some confusion of ideas in this case as to the exact right of a Plaintiff who asserts that trust money is in the hands of a Defendant to the suit. If he can succeed in extracting from the Defendants an admission of a trust, or of the facts from which the existence of a trust would be clearly and unquestionably proved, he will be entitled to an order for payment of the trust fund into Court. In the present case it is contended, that although the Plaintiffs cannot have an order for payment into

(1) 4 D. M. & G. 372.
(2) 2 D. F. & J. 175.
(3) 13 W. R. 493.
(4) Law Rep. 1 Eq. 11.

Court, still, if they show there is a case to try at the hearing, whether the Defendant has or has not trust money in his hands, that they will be entitled to an injunction to prevent the fund, which the bill seeks to have treated as money impressed with a trust, from being transferred or dealt with. I seems to me, I confess, that the jurisdiction thus invoked is totally novel. A Court of law has no such jurisdiction. A writ of *ne exeat* might be sued out in this Court, and security obtained at law upon an allegation that the Defendant was about to leave the country. But there is no jurisdiction to deal with the assets, the right to which is the question to be tried at the hearing, and it does not seem to me to make any difference that the company is a limited company about to be wound up. Where proceedings have been commenced at law, and this Court is asked to interpose in consequence of there being a right to be tried here, the legal right is admitted, and the Court, if it thinks that there is an equitable right to be tried, will stay the proceedings at law upon payment of the money into Court, or upon having judgment given. But here I am asked to interfere with the possession of this property *ex concessis* in the hands of the Defendant, whether it is so rightfully or wrongfully being the question to be decided. I agree with Mr. *Rolt* that there is a very considerable question to be tried, but it is an argument which is favourable to the Defendants. I do not say that the Plaintiffs may not have some remedy when the case comes to be tried, but there is very much doubt upon many points in the case. I should be the last person in the world to throw out any expression which would sanction those monstrous agreements for promotion money, of which the proprietors know not a word when they subscribe their money; but here the shareholders must be taken to have known the contents of the articles of association, by which the directors were empowered to pay such reasonable amount by way of commission in relation to the formation of the company as they might think proper; and looking at the enormous amounts which have been paid for promotion money, in several of the cases that have come before me, this £5000 really does not seem to be such a very appalling sum, or very astonishing to any one who is acquainted with transactions of this kind. Any shareholder of common intelligence looking at the prospectus

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would form a pretty shrewd guess that the *Ottoman Company, Limited,* were the persons through whom the bank had been formed and brought out. Is it then exceedingly astonishing that £5000 should be paid by way of commission? Independently, too, of any opinion upon the merits, notice of the vote for this payment, and of the cheque for £5000, is recorded in the books of the company. The question then is, whether there is not a very grave question to try, and if so, the fact seems to me adverse to the Plaintiff, as I am asked to prevent people from dealing with what they consider to be their own money, because an adverse claim is asserted. With respect to following the money, I agree that it does not follow from anything in the Defendants' affidavit alone that this £5000 has been drawn out. But it is not unimportant to observe, that the £5000 was not paid in on any trust, but to the general account of the company at their bankers. It is not the case of the *Ottoman Company* having undertaken to be trustees for the Plaintiffs, but rather that they have got from the Plaintiffs' trustees money which, as the Plaintiffs say, those trustees should never have paid, and as to which they have committed a breach of trust. Or take the case of a bill filed by *A.* against his trustees, alleging that having £20,000 of his money, and owing £10,000 to *X.*, they paid this £10,000 in satisfaction of their own private debt. If *X.* insists that he did not know of the breach of trust, or believe the money paid to him to be trust money, the Court would say that there was a case, to be tried at the hearing, but in the meantime would never dream of restraining *X.* from dealing with such money. So in this case, where the Defendants say that the £5000 which has been paid to them is not trust money at all, but a sum authorized to be paid by the directors of the *Bank of Turkey,* with the consent of the shareholders, it would, as it appears to me, be impossible to restrain them from dealing with their property. Nor, upon the other point of the case, can I restrain them from dissolving the company before this £5000 shall have been secured. I cannot so deal with them in their corporate capacity, whatever might be done with shareholders individually. However, that is not a matter to inquire into now. It should be established to my satisfaction that there would be a case in which the remedy would be hopeless, before I could proceed upon that ground. I must,

therefore, dismiss this motion, and as it is an experimental application, I must dismiss it with costs.

Solicitors for the Plaintiffs: Messrs. *Ashurst, Morris, & Co.*
Solicitors for the Defendants: Messrs. *Courtenay & Coombs;* Messrs. *Kimber & Ellis.*

WASHOE MINING COMPANY *v.* FERGUSON

Company—Security for Costs—Companies Act, 1862, *s.* 69—*Waiver—Cause and Cross Cause.*

A Defendant, sued by a limited company, which had called up and expended all its capital, received notice in April, by a report of the directors, that they had no funds to meet a bill which had been drawn on the company by their manager, and that they recommended an issue of new shares with a preferential dividend. On the 4th of May notice of an extraordinary general meeting for the 12th was given, at which meeting resolutions were passed enabling the directors to borrow a large sum of money on loan. Defendant's extended time for answering expired on the 7th of May, and on the 4th he took out a summons, whereupon he obtained on the 8th a week's further time; and on the 15th he filed his answer. On the same day (though at what hour of the day did not appear), he received notice from the directors that the attempt to raise the money had failed:—

Held, that the Defendant had not by putting in his answer, waived his right of calling upon the Plaintiff company to give security for costs, under the 69th section of the *Companies Act*, 1862.

A. filed a bill against *B.*, the registered holder of 1000 shares in a company, and against the company and their secretary, for specific performance of an alleged contract by *B.* to transfer the shares to *A.*, and for an injunction to restrain the company from transferring the shares to any one else than to *A.* The company thereupon filed a bill against *A.* and *B.*, praying for declarations that the alleged contract was fraudulent and void, and that *A.* and *B.* were trustees of the shares for the company:—

Held, that the second suit was not so strictly in the nature of a cross suit to the first, that *A.* was deprived of the right of calling upon the company to give security for costs.

THIS was an adjourned summons on behalf of the Defendant *Ferguson*, that the Plaintiffs, the company, might be ordered to give security for costs in the sum of £100.

From the applicant's affidavit, it appeared that the company was incorporated in 1862 as a limited company, and registered in June,

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1865, with a capital of £100,000, in £5 shares, for carrying on mining operations at *Washoe* and *Humboldt* in *Nevada*. The entire capital of the company had been called up and no dividend had been declared. On the 30th of April, 1866, in anticipation of a general meeting of the company, held on the 30th, the directors issued a report, whereby it appeared that the mine had as yet produced nothing, that the whole capital had been expended, and that the manager was in debt to the bankers to the amount of 7,000 dollars. The report stated that to meet this, and the expenditure of the company for January and February, the manager had drawn a bill on the directors for £5,951 14*s.* 8*d.*; and that the directors recommended to the shareholders an issue of 5,000 new shares to carry a preferential dividend of 15 per cent. At the meeting of the 30th no resolution to raise additional capital was passed. At an extraordinary general meeting, held on the 12th of May (notice of which was given on the 4th), a resolution was passed enabling the directors to borrow £25,000 on loan, but the resolution became inoperative in consequence of the subscriptions not reaching such an amount as was necessary to enable the directors to meet the company's liabilities. On the 15th of May the directors issued and sent to the shareholders by post a notice that under the circumstances they had been compelled to allow the bill for £5,951 14*s.* 8*d.* to be returned unpaid, but that they hoped to prevent any sacrifice of property, and to be able to reconstruct the company.

Under these circumstances the Defendant *Ferguson* submitted that the company was insolvent, and that the assets would be insufficient to pay his costs.

In defence to the motion the company's solicitor deposed that interrogatories were delivered on the Defendant *Ferguson* on the 12th of March; that the extended time to answer expired on the 7th of May; that on the 4th of May the Defendant took out a summons for further time, and on the 8th a week's further time was granted; and that on the 15th of May the Defendant *Ferguson* filed his answer.

It did not appear at what hour of the day the answer was filed, whether before or after the receipt by the Defendant of the directors' notice.

It appeared that in November, 1864, the present applicant,

George Ferguson, had filed a bill against *William Sydney O'Connor*, *the Washoe Company*, *John A. Robertson*, their secretary, and *Joseph Love*, praying for specific performance of an alleged agreement by *O'Connor* to transfer 1,000 numbered shares standing in his name to *Ferguson*; that *O'Connor* might be decreed to withdraw a notice which he had given to the company not to transfer the shares to *Ferguson*, and might be restrained from giving notice to the like effect; and that, if necessary, the company might be restrained from transferring the shares to any other person than *Ferguson*; for discovery against the secretary; and that the respective rights to the same shares of *Ferguson* and *Love* (who claimed to be a transferee), might be declared by the Court.

The present bill was filed on the 26th of February last by the company against *Ferguson* and *O'Connor*, praying a declaration that the alleged agreement between *Ferguson* and *O'Connor* was fraudulent and void, and that they were respectively trustees of such shares for the company; that *O'Connor* might be decreed to transfer the shares to the company; and that he might be restrained from transferring to *Ferguson*, or otherwise than to the company, until the question in the suit should have been decided.

Mr. *Bedwell*, for the Defendant *Ferguson*:—

This application is made under the 69th section of the *Companies Act*, 1862, which provides that where a limited company is Plaintiff in a suit, the Judge may, "if it appears by any credible testimony that there is reason to believe that, if the Defendant be successful in his defence, the assets of the company will be insufficient to pay his costs," require security to be given.

It will be said that the Defendant has put in his answer since knowledge of the insolvency; but at a time when the report in April held out some hope of further capital being raised, an application of this kind would have been refused as premature. Accordingly the Defendant waited, and when the extraordinary general meeting was held, and further expectation was held out of the money being raised on loan, he waited again, and, on the very last day, put in his answer.

It is true that on that day the directors issued their notice, but

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it does not appear that the Defendant received it before he filed his answer; and an involuntary act on the part of the Defendant is no waiver of his rights.

It will be said that this is a cross cause: but it is not a cross cause in the sense of being a mere defence to the original cause, the subject-matter being something very different.

Mr. *Elderton* for the company:—

These matters are substantially a cause and cross cause. The case set up by the company is, that the agreement upon which the first suit is founded was fraudulent and void. That might be a very good defence to the first suit; and at any rate the causes must be heard together.

It is not admitted that the assets are insufficient; but be that as it may, the Defendant has clearly waived his right, by putting in his answer. He heard of the state of things upon which he now applies, in April; he took no step, beyond enlarging his time for answering, and finally he put in his answer. Even where an answer was by mistake not filed till after Defendant knew of Plaintiff going abroad, though sworn long before, security for costs was refused: *Dyott* v. *Dyott* (1). It will be refused whenever the Defendant has taken any step whatever after the facts have come to his knowledge: *Craig* v. *Bolton* (2); *Swanzy* v. *Swanzy* (3).

Sir W. Page Wood, V.C.:—

I think this is a case in which security ought to be given for costs under the Act.

This is a very different case from those where the Defendant has heard of the Plaintiff's having gone abroad, and then takes some step in the cause. Then, of course, he is precluded from calling on the Plaintiff to give security.

The words of the statute are, "if it appears by any credible testimony that there is reason to believe that the assets of the company will be insufficient to pay the costs." Therefore the Defendant is not justified in applying, until there is some reason for believing that the assets will be insufficient. He must wait till he is in possession of the necessary facts.

(1) 1 Madd. 187. (2) 2 Bro. C. C. 609. (3) 4 K. & J. 237.

Now did this gentleman know, when he took these two steps, one on the 4th of May of applying for further time, the other on the 15th of May of putting in his answer, that the assets of the company would be insufficient? On the 4th of May he knew that the capital was spent. By that statement of the 30th of April, he was informed also that the manager was in debt to the bankers to the amount of 7,000 dollars. The directors say:—"To pay this and the expenditure of the company for the months of January and February the manager has drawn a bill on the directors for £5,951. The directors having no funds to meet this, are compelled to appeal to the shareholders to raise additional capital, and they have therefore resolved to recommend an issue of 5000 new shares to carry a preferential dividend of 15 per cent. per annum." That being so, on the 4th of May they give notice to the Defendant of an extraordinary general meeting for the 12th of May to consider, and if approved to adopt, special resolutions to authorize the directors to raise and borrow any sum or sums of money not exceeding £25,000, in such manner, and upon such terms and securities, as they think fit; and it is to be observed the company still hold the property, and the directors even now seem sanguine of working it with success. If the Defendant had applied immediately after receiving this notice of the 4th of May, he would have been told, "We are about to hold a meeting; we have property in *America;* wait and see what will be done on the 12th of May." In that state of things the Court would have been very much disposed to stay its hand. It certainly does not appear to me that at that time this gentleman had full notice of the insolvent state of the company's affairs, in the sense in which, in the authorities cited, the Defendant was aware of the simple fact of the Plaintiff being abroad.

But of the state of the company's affairs he was no doubt aware on the 15th of May, which was the day on which his answer was put in. On the 15th, it is to be observed, he was under compulsion; nor does it appear that he received the circular before he put in the answer. On that day he learnt that "when the shareholders present at the meeting of the 12th were asked to support the resolutions, by subscribing to the loan notes, and when their subscriptions were added to those of absent shareholders, the whole

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number, including those subscribed by the directors, which were nearly a moiety of the whole, fell short of the smallest amount absolutely required. It was, therefore, evident that the inducements offered were not sufficient to lead them to subscribe the money required. Under these circumstances, the directors say they have no alternative but to allow the bill for £5,951 14*s.* 8*d.* to be returned to *America* unpaid; but add, that they have written in such terms to the bankers who hold the bill, and sent such instructions to Mr. *Ridge*, as they believe will prevent any sacrifice of the company's property, and that in the mean time they have under consideration a plan for the reconstruction of the company, which it is hoped will place the undertaking on a satisfactory footing."

Under these circumstances can I say that this gentleman has waived his right by filing his answer (as I must assume he did) before receiving that letter? Can I say that he waived it on the former occasion by making that application for extending the time for answer, or that there was sufficient testimony on either of these occasions to give him reason to believe, or by analogy to have satisfied the Court, that the assets of the company would be insufficient to pay the costs? I cannot think that there was, or that there has been any waiver on his part.

That the assets are insufficient, in the absence of any evidence as to the value of the mine, I must now hold.

As to the defence, that this is a cross bill, it appears that the state of the case is this—The Plaintiff in the original suit says to the Defendant in that suit (in which the company are also Defendants):—"These shares are mine, not yours." Whereupon the company file a bill against the original Plaintiff and the original Defendant, and say: "These shares belong neither to one nor the other of you; they are ours." I apprehend that would be a complete defence to the bill. It is like the case of a bill for specific performance, where the Defendant says the contract was in different terms from those in which the Plaintiff describes it to have been, and then files a bill to have his alleged agreement fulfilled. That would have been a very complete defence to the original bill, if pleaded by way of answer; but the so-called cross bill asks for performance of an entirely different agreement.

The principle of not making the Plaintiff in a cross suit give security is, that the cross bill is a mere defence to the original bill, and this bill is more.

The summons must, therefore, be allowed; the costs of the applicant to be costs in the cause.

Mr. *Elderton* asked that the company might be allowed the option of paying the money in, or giving security.

The VICE-CHANCELLOR said they might take their option of doing one or the other before taking any further proceeding.

Solicitor for the Defendant: Mr. *Edward Pope.*
Solicitor for the Company: Mr. *John Richardson.*

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Practice—Consolidated Order XIV., rule 17*—Amendment—Plea to whole Bill.*

Defendants filed a plea of bankruptcy, and the Plaintiffs, by taking none of the steps pointed out by *Consolidated Order XIV., rule* 17, gave Defendants the right to obtain, as of course, an order to dismiss the bill. The Defendants not availing themselves of such right, the Plaintiffs subsequently obtained in Chambers an order to amend, in the presence of Defendants' solicitor, who objected, but was told that the order to amend would not prejudice his clients:—

Held, notwithstanding this laches on the part of their solicitor, that the Defendants were entitled, upon motion for that purpose, to have the order to amend discharged, but without costs, and bill dismissed with the same costs as if plea allowed on hearing.

MOTION on behalf of three of the Defendants, that an order to amend obtained at Chambers on the 8th of February, 1866, might be discharged and the amendments taken off the file. The bill was filed on the 15th of April, 1865, and interrogatories were filed on the 15th of May. On the 19th of May the Defendants now moving became bankrupt. On the 30th of September they filed a plea averring this bankruptcy. The Plaintiffs did not set down the plea for argument, nor give notice of an undertaking to reply to the

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plea, and consequently, by Order XIV., rule 17, the Defendants at the expiration of three weeks were entitled to obtain, as of course, an order to dismiss the bill. On the 8th of February the Plaintiffs having taken out a summons for the purpose, obtained an order to amend their bill by stating the bankruptcy of the three Defendants, and making their assignees parties. The solicitor acting for the Defendants had made an affidavit in support of the present motion, in which he stated that he attended before the Chief Clerk on the occasion of making such order, that he did not consent thereto, but on the contrary he objected and referred to Order XIV., rule 17, in support of his objection, "but the order was made notwithstanding, it being intimated that it would not affect the rights of the said Defendants." On the 27th of March (the time for amending having been enlarged by a further order of the Chief Clerk) the order, together with a copy of the amended bill, was served upon the Defendants, and 20*s.* was paid to their solicitor by the Plaintiffs' solicitors as costs of amending.

Mr. *G. M. Giffard*, Q.C., and Mr. *Druce*, in support of the motion, contended that the order to amend was irregular, and ought not to have been made after a plea to the whole bill had been allowed by default, which was equivalent in effect to a decree declaring that the case made by the bill had failed entirely against the Defendants.

Mr. *E. K. Karslake*, for the Plaintiffs, contended that as the Defendants had not availed themselves of the power given to them of obtaining an order to dismiss the bill at the expiration of three weeks from filing the plea, but had allowed a long time to elapse, they could not now avail themselves of Order XIV., rule 17. Whatever right might have existed under that order of getting the bill dismissed, was lost by laches, especially after the Plaintiffs had been allowed to take a new step in the suit, and these Defendants by their solicitor had accepted the costs of amendment when tendered to them.

Mr. *Giffard*:—The 20*s.* costs were re-tendered (1).

(1) See 1 *Smith's* Ch. Prac. 529.

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[The VICE-CHANCELLOR referred to *Neck* v. *Gains* (1).]

SIR W. PAGE WOOD, V.C., said that the whole thing was utterly irregular. The plea of bankruptcy was a plea to the whole bill, and the Plaintiffs not having set down the plea for argument within three weeks, nor served an order for leave to amend, nor given notice of an undertaking to reply to the plea, it was clear that under rule 17 of Order XIV., the Defendants at the expiration of the three weeks might have obtained an order to dismiss the bill as of course. There had been a considerable degree of laches on the part of the Defendants' solicitor, and it was difficult to say why, instead of contenting himself with objecting in Chambers to the order to amend being made, he did not at once obtain an order to dismiss the bill. He had been told, however, that the order to amend would not prejudice the Defendants, and on this ground his Honour was of opinion that notwithstanding all this irregularity, the Defendants ought to be put in the same position as they would otherwise have been, and have the order to amend discharged, except that they must, on account of their laches, be refused the costs of this motion.

MINUTES:—Discharge the order to amend as against these Defendants without costs, and dismiss the present bill with the same costs as if Defendants' said plea had been allowed as a plea to the whole bill at the hearing without leave being given to amend.

Solicitors: Messrs. *Linklaters, Hackwood, & Co.*; Mr. *Kearsey*.

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Company—Companies Act, 1862—*Contributory—Fully paid-up Shareholder—Voluntary Winding-up—Call for the Adjustment of Rights of Contributories amongst themselves*—25 & 26 *Vict. c.* 89, *s.* 133, *par.* 9.

The word "contributory," in sect. 133, par. 9, of the *Companies Act*, 1862, includes fully paid-up shareholders.

Consequently, where, under a voluntary winding-up, after all debts and

(1) 1 De G. & Sm. 223.

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costs had been provided for, a call had been made by the liquidators upon the partly paid-up shareholders purporting to be "to adjust the rights of the contributories amongst themselves," the object being to equalise the payments of the ordinary shareholders with the nominal advances of shareholders who had taken fully paid-up shares in exchange for property sold to the company:—

Held, that the call was valid.

THIS was a Petition presented by four of the ordinary shareholders in the *Anglesea Colliery Company, Limited*, which was being wound up voluntarily, praying for a declaration that the liquidators had no authority to make a call for the purpose of dividing the proceeds, or any part thereof, among the holders of paid-up shares, and that a resolution of the liquidators for a call of £1 a share, and the notices issued pursuant thereto, were *ultrà vires* and void, and that the liquidators might be prohibited from doing any acts to enforce the call.

From the Petition and the affidavit of the liquidators the following circumstances appeared:—

The *Anglesea Colliery Company, Limited*, was registered on the 25th of July, 1863, for the purposes, as stated in the memorandum of association, of purchasing and working a colliery called the *Berw Colliery*, plant, machinery, and other works, in the Island of *Anglesea*. The memorandum of association did not state from whom, or at what price, the colliery was to be purchased, or how the purchase money was to be paid. The company was registered with the articles of association contained in Table A of the *Companies Act*, 1862. The nominal capital was £35,000, in 7000 shares of £5 each. Only 825 ordinary shares were subscribed for, of which the present petitioners were the holders of twenty-five each.

By an agreement dated the 16th of November, 1863, the liquidators of a company called the *Island of Anglesea Coal and Coke Company* agreed with the present company to sell to them the *Berw Colliery*, which was held on lease for a term of thirty-one years from the 13th of November, 1839, for £250 cash, and 4950 paid-up shares of £5 each in this company. Nearly the whole of the £250 was paid to persons who held the title deeds of the colliery, and possession was given up to the present, or *Anglesea Company*. The 4950 paid-up shares were registered in the names of the liquidators

of the former, or *Island of Anglesea Company*. These liquidators were a Mr. *Durant*, a Mr. *Dixon*, and a Mr. *Cookson*, of whom *Durant* held 443, and *Dixon* held 50 of the shares in the *Island of Anglesea Company*, of which the assets were only the colliery and some £20 or £30 in cash, the liabilities being a sum of £1650 and the costs of the winding-up.

Upon the 825 shares in the new, or *Anglesea Company*, £4 was paid up. The undertaking was not successful, and on the 17th of January, 1865, a special general meeting of shareholders was held, at which it was resolved that the *Anglesea Company* should be voluntarily wound up, and *Dixon* and *Cookson* were appointed liquidators, together with a Mr. *Wright*, who was one of the Petitioners.

On the 30th of December the liquidators sold the colliery and the effects to Mr. *Durant*, one of the above-named liquidators of the *Island of Anglesea Company*, and a director of the *Anglesea Company*, for a sum of £2100, and possession had been given up to him.

At a meeting of the liquidators of this company, held on the 22nd of January, and attended by *Dixon* and *Cookson*, it was resolved, in order to enable the liquidators properly to "adjust the rights of the contributories amongst themselves," that a call of £1 should be made upon the holders of shares upon which £4 only had been paid, and that notice be sent "to such members settled on the list of contributories" forthwith. Notices were issued accordingly.

For the Petitioners evidence was given that the mine had never been worth more than £2000 or £3000 cash.

The liquidators by their affidavit said that there still remained £250 of *Durant's* purchase money to be paid, and that for this sum an acceptance had been given which was due on the 30th of March, that they had paid the greater portion of the debts of the company, and *they believed there would probably remain about* £500 *or* £600 *in their hands after payment of the rest of the debts and expenses.*

Mr. *Rolt*, Q.C., and Mr. *Hemming*, for the Petitioners:—

This call purports to be made under the authority of sect. 133, par. 9 of the *Companies Act*, 1862, which provides that the liqui-

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dators may call on all or any of the contributories, to the extent of their liability, to pay all or any sums they may deem necessary to satisfy debts, liabilities, costs, charges, and expenses, "and for the adjustment of the rights of the contributories amongst themselves;" and it is admitted that the call is not required for any purpose except it be to adjust the rights of the paid-up and non-paid-up shareholders amongst themselves. But is a paid-up shareholder a contributory? Sect. 74 of the Act defines a contributory to be a person liable to contribute to the assets of a company under the Act, in the event of the same being wound up. A fully paid-up shareholder is not liable to contribute to the assets of a limited company. Hence he is not a contributory, and a call to adjust his rights and those of other shareholders amongst themselves is not legal: *Re Cheshire Patent Salt Company* (1); *Ex parte Currie* (2).

Independently of the statute, the paid-up shareholders have no equity to compel the ordinary shareholders to pay up in full, because the nature of the arrangement is this: The landowner contributes land to the undertaking, the subscriber money; one cannot do without the other. Until the mine is worked its value is wholly uncertain. Accordingly the landowner enters into a speculation; he does not part with his land except at a price in shares greatly exceeding the market price in money; he does not, like an ordinary shareholder who pays up in advance, stipulate for interest; he takes the chance of a dividend; if the undertaking succeeds he is to stand in the same position as if he had brought in the nominal price in cash, but if it fails before the other shares are paid up he is not intended to take an enormous value for a worthless mine. It would be monstrous to hold that he could at any time, by a preponderance of votes, wind up the concern, sell the property, and make the unpaid-up shareholders pay the purchase money; or, in other words, compel the unpaid-up shareholders alone to raise a fund, in which, if there should be any surplus, he himself would be entitled to participate. It is not like the case of a private partnership, where the partner's interest is really valued at its market price in money.

This company had no power to issue paid-up shares in purchase of

(1) 1 N. R. 533. (2) 1 N. R. 71; 32 L. J. (Ch.) 57.

the colliery. Nothing was said about such a mode of purchase in the memorandum or articles of association: *Nickoll's Case* (1).

[The VICE-CHANCELLOR:—That case was decided wholly upon fraud.]

It nevertheless shews what the consequence would be, if an agreement were carried out which was not binding on the company: *Ex parte Daniell* (2).

Mr. *Dickins*, for other shareholders in support of the petition.

SIR W. PAGE WOOD, V.C. (without calling on the respondents):—

I read this Petition as stating, as matter of fact, that the consideration for this mine was to be paid partly in cash and partly in paid-up shares. It strikes me that what those words were intended to express was, in substance, simply this; that the company, knowingly and of their own accord, entered into an arrangement to purchase, and did purchase, certain mines for the sum of £25,000, and agreed to pay for them in the particular way mentioned, namely, so much in money, and so much in fully paid-up shares. It appears to me that the persons who entered into that agreement cannot now complain that the contract was *ultrà vires*, when the very thing has been done which all of them knowingly intended should be done for the purpose of carrying on the business for which the company was formed. It is not alleged that any fraud was practised on the company. This case is totally different from those that have been cited of *Nickoll's Case* and *Ex parte Daniell*. In those cases the directors thought fit, behind the back of the company, to give a *bonus*, as it is called, to a promoter of the company, and they screened the fact by giving it in paid-up shares. Then, when the company came to be wound up, the general shareholders contended that these gratuitous shares, upon which no money had been paid, ought to be fully paid up.

Those cases cannot have any application to the present, where the parties have acted throughout according to their previous arrangement. The company, *ex concessis*, knew that they were to

(1) 24 Beav. 639. (2) 1 D. G. & J. 372.

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pay £25,000 for the mine, and they knew that the seller was to receive part of the price in paid-up shares. What difference could that circumstance make to the company, except a difference very much in their favour? The purchasers did not find it convenient to pay a sum of money down, and accordingly the vendors said: "Instead of taking interest on our unpaid purchase-money, we will take shares, on which it shall be considered that we have paid up all the calls in advance, and we will not ask for interest." The arrangement was as complete as possible. If the shareholders find the company in possession of a mine, without a sixpence being paid for it, they must know, either that the shares with which that mine was purchased represent fully paid-up shares, or that they have got the mine for nothing. *Volenti non fit injuria.* I cannot distinguish the case from that of a brewery, or any other concern in which persons agree that they will all be shareholders to such and such an amount in shares, and one of the shareholders agrees that his shares shall be considered as paid-up by the plant and property he has brought into the company, and that thereupon he shall become a shareholder.

If property is paid for in that way, instead of being paid for in cash, and the parties choose to enter into such a bargain, I cannot understand the proposition:—"We are to work the mine; you are entitled to have the paid-up shares; and you must take your chance of dividing profits with us in this way. If it is very profitable (subject of course to our having to pay up our calls whenever we are called upon to do so), we shall get a profit per share just in the same proportion as you do." It seems to me, when you have got all the assets divided amongst the shareholders in the proportion of their capital, that the theory which has been suggested cannot be carried out—that because one has paid £5 and the other £4, therefore profits are to be divided in the ratio of 5 to 4. Suppose that the profits had been £500,000 or £600,000, all would have been enabled to share equally in the profits rateably, according to the number of shares held by them; there is no contract to divide profit or loss in proportion to the money that has been paid up. The contract is that everybody is to bear the profit rateably, and the loss rateably. It follows, therefore, if this company purchased their mine for £25,000, and it ultimately turns

out to be worth only £2000, that the loss must fall equally on those who have taken shares instead of money for their property, and on the others.

With respect to the case of suggested fraud, in consequence of a minority being overborne by a majority, it is sufficient to say, that when such a case as that is properly brought before the Court, it will know how to deal with it.

But inasmuch as liquidators are creatures of the statute, their powers must be strictly construed. Now, with reference to the 133rd section, it appears to be a fact that the liquidators have not inserted the names of these paid-up shareholders in the list of contributories. In the resolutions the word "contributories" is used twice. I must hear the respondents as to the power of the liquidators to make a call.

Mr. *G. M. Giffard*, Q.C., and Mr. *Roxburgh*, for the liquidators:—

Section 170 of the Act directs that the existing winding-up practice is to be the basis of the new practice, and under the old winding-up Acts persons might be put on the list of contributories who might be called upon to receive and not to pay. The word "contributories" is not limited by the 9th paragraph of the 133rd section to persons who are merely to pay. "Contributories" means "members." The object of the Act (section 134), is to have a complete winding up. *Ex parte Currie* is not in point. Unless "contributories" include paid-up shareholders, there never can be complete winding-up under the Act. Suppose the case of no calls, no debts, and only assets to distribute; how is the Court to act? These shareholders are not creditors; then they must be contributories: *In re Constantinople and Alexandria Hotels Company* (1).

Mr. *Rolt*, in reply:—

"Contributories" cannot be read "members" when the Act has distinguished the words by express definition, which is adhered to throughout. The authorities are against any such construction: *In re Artificial Stone Company* (2).

(1) 13 W. R. 851. (2) 11 Jur. (N. S.) 4.

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May 7. Sir W. Page Wood, V.C.:—

There remains this question, how the Court ought to deal with the subject before it, regard being had to the position of those who have paid up their shares in full, and to the peculiar language of the Act with reference to "contributories," as they are termed.

The question itself is, whether or not some gentlemen who have sold a mine, and to the knowledge of those who constituted the company have taken the price of it in paid-up shares, are or are not, and how far, and to what extent they are, capable of having any sum of money raised upon the shares which are not fully paid up (as for instance, those upon which £4 instead of £5 has been paid), in order to place them upon an equal footing with the other shareholders in the company, after all the debts are paid.

With regard to the equitable right which these persons would have, independently of the winding-up Acts, it would clearly be the right of every partner, when the partnership was wound up, and the debts were paid, to have his share of the capital paid up or paid out to him; and for that purpose to have contribution from his co-partners. That would undeniably be the case with regard to a concern—for example, a brewery—with three or four partners, where a set of partners were found to be debtors to another partner in respect of the amount of capital advanced by him in excess of his share.

Then, the question is, what is to be done with reference to the position that the company now occupies; its debts being paid, a certain number of persons having paid up their shares in full by giving an equivalent in property, and a certain number of other persons having paid up only £4; whether or not it is now right that the liquidators should make a call upon those persons who have not paid up their shares in full, for the purpose of equalising the rights of all the partners in the concern.

The Act in its language is not very clear, and upon consideration one sees how the ambiguity in the framing of it arose. The word "contributory," is used in the 133rd section for this reason—that the word "member" would not have been sufficient;

there being many persons "contributories" who are not "members." In the 38th section of the Act, the persons liable to contribute in the event of a company being wound up, are said to be every present and *past* member of such company, excepting, of course, amongst other persons, those who have paid up their shares in full. Contributories therefore may comprise past as well as existing members; and some larger expression than the simple word "member" was required in the 133rd section.

Then, by the 74th section, the word "contributory" is defined as meaning every person liable to contribute to the assets of a company under the Act, in the event of the same being wound up; thus referring back to the section which declares that every past and present member with the exceptions there mentioned, shall be liable to contribute.

Now, it has been suggested that the Legislature could hardly have contemplated the case of paid-up shares at all; because if that had been the case, it would have contemplated an unlikely and improbable event, inasmuch as, *de facto*, people do seldom pay up their shares, except in the case where property which is bought by the company is to be paid for in paid-up shares. But I observe that the Legislature did contemplate, and actually deal with the very case of certain shares being treated as paid-up; because in the 25th section of the Act, it specially notices that class of shares. It was expressly contemplated here by the Legislature that there might be shares which *de facto* were not paid-up, but which should, for some purpose or other, be considered as paid-up between the members of the company.

There is more than one way in which shares may be paid-up in full. Property, as in this instance, may be sold to a company, and the price paid in shares; or persons may avail themselves (though I am told it is not commonly done) of the power given to the directors in Table A, of allowing persons to pay up all their shares at once and receive interest upon the amount paid in advance.

When the assets of a company come to be distributed, the liquidator is put in full possession of all the assets of the company.

The 142nd and 143rd sections provide that as soon as the affairs of a company are fully wound up the liquidator shall make a return to the Registrar, and upon the expiration of three months

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from the date of registration of such return, the company shall be deemed to be dissolved. The process is this: when the assets are all got in, the liquidator distributes such assets, first, in payment of the creditors; and if he has a balance remaining in his hands, he is to distribute that amongst those who are entitled to it in their proper proportions. He is then to inform the Registrar of what he has done; the company is dissolved, and so there is a final determination of the whole matter.

Now, what was the object and scope of these Acts from first to last? The original object was to enable those numerous bodies which were being formed as joint stock companies, to get over the difficulties which arose from proceeding by suit in this Court to wind up their affairs like an ordinary partnership. The intention was, that every partnership of this sort should be wound up as clearly and effectually as if there were a bill filed for the administration of the assets. *Wallworth* v. *Holt* (1) was a case which went as far as was possible in collecting assets, leaving the distribution of them unprovided for; and it was just to meet that difficulty of the final distribution that the Act was passed. How could there be equal distribution unless the rights of the partners were first determined and adjusted?

Looking at the 142nd and 143rd sections of the Act, I think one can see enough to say that the Court is not so narrowly restricted by the language as to prevent it from doing justice. The language of the Act is, that the liquidator or the Court—according as it is a voluntary or a compulsory winding-up—has the power to make calls, to pay the debts, and so on, and to adjust the rights of contributories.

No doubt the argument is a fair one, "you who have fully paid up your shares are not contributories, and therefore your rights cannot be required to be adjusted; you have paid your £5 per share, and having fully paid up the amount, it is unnecessary to adjust your rights; although if there are any shareholders who have paid only £4 19*s.* 6*d.*, they will, in that state of circumstances, have a claim to have their rights adjusted." The result would be, that those who have paid in full would have no voice or controlling power in disposing of the assets; and these being distributed, the

(1) 4 My. &. Cr. 619.

company is dissolved. They would therefore have no remedy whatever. I think that is not the scope of the Act. It appears to me that the sound construction of the Act requires that there should be given to that word "contributory," the effect of providing for the final adjustment of the rights of all persons, who, if their shares were not paid up, would be in the position of contributing members.

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It appears to me, therefore, on these grounds, that no order ought to be made upon this Petition. It was a very fair point to be raised, and the costs of the Respondents, the liquidators, will be paid out of the assets; but I can allow no costs to the Petitioners or the other shareholders who appeared.

Solicitor for the Petitioners: Mr. *James Bell.*
Solicitors for the Respondents: Messrs. *Thrupp & Dixon.*

HOWARTH (OTHERWISE MILLS) *v.* MILLS.

V.-C. W. 1866 *May* 29.

Will—Gift by a Mother to Children "legitimate or otherwise"—Illegitimate Children born after the Date of the Will excluded.

Bequest by a single woman who had gone through the ceremony of marriage with her deceased sister's husband, in favour of her children "legitimate or otherwise." At the date of the will she had one child living, and several were born afterwards:—

Held, that the after-born children were excluded; and that the gift enured to the benefit only of the child living at the date of the will.

SARAH MILLS, spinster, on the 8th of July, 1851, went through the form of marriage with *Edward Howarth*, the widower of her deceased sister.

By her will, dated the 13th of February, 1855, *Sarah Mills* gave and devised to trustees all her household estates, lands and tenements, goods, chattels, and all other her personal estate, upon trust to sell, collect, and get in the same, and as to the moneys to arise by such sale, to pay to *Edward Howarth* £100, and as to the residue as follows:—"for my said trustees or trustee to pay and apply the same, in such proportions as my said trustees or trustee may

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think fit, in and towards the maintenance, education, and advancement in life, of each and every of my children, legitimate or otherwise, which shall be living at the time of my decease, until each of such children, legitimate or otherwise, shall respectively attain the age of twenty-one years. And I hereby further direct that as soon as either of my said children, legitimate or otherwise, shall attain the age of twenty-one years, and as often as the same shall occur, my said trustees or trustee shall pay unto such child its proportionate share of the said trust estate, such share in each case to be determined by the value of the said trust estate at the time of the majority of such child."

At the date of the will testatrix had had one child, of which *Howarth* was reputed father, and who was now living. After the date of the will she had four other children, three of whom were living at her death, which took place on the 8th of January, 1864.

It did not appear that there was any revocation, alteration, or republication of the will by the testatrix.

This bill was filed by the infant child born before the date of the will, against the trustees and the three infant after-born children, for administration, and praying for a declaration that the Plaintiff was solely entitled.

Mr. *W. W. Cooper*, for the Plaintiff:—

The law is settled that neither a man nor a woman can provide for future illegitimate children: *Medworth* v. *Pope* (1); *Barnett* v. *Tugwell* (2); *Bentley* v. *Blizard* (3).

Mr. *E. K. Karslake*, for the Defendants, the after-born children:—

Sarah Mills could not by this will have provided for any of her children other than her illegitimate children, because directly she contracted a valid marriage, the will would have been revoked.

[The VICE-CHANCELLOR:—That is only more conclusive of her intention.]

Then the question is, whether the cohabitation of a woman with her deceased sister's husband is such an immoral connection as that

(1) 27 Beav. 71. (2) 31 Beav. 232. (3) 4 Jur. (N. S.) 652.

the Court will go the length of depriving the children of this property, in order to punish the parents.

[The VICE-CHANCELLOR:—The law calls such a cohabitation as this incestuous. It makes no distinction between a man's marrying his wife's sister, and marrying his mother.]

The Master of the Rolls, in *Medworth* v. *Pope* (1), grounded his decision expressly on the reason that a provision for future illegitimate children is *contra bonos mores:* but it may be submitted whether a provision for the children of a union with a deceased sister's husband is such an "incentive to vice," as Mr. *Jarman* expresses it (2), as to induce the Court to carry the rule so far as to deprive these children, all of whom must have been born before the will could come into operation, of the provision intended for them, and whether the maxim will not apply, *quod fieri non debet factum valet.*

Mr. *J. J. Jervis*, for the Trustees.

SIR W. PAGE WOOD, V.C.:—

I cannot doubt that there was an intention on the part of the testatrix to provide for these unfortunate children, and for their sakes I regret that it cannot be carried into effect. The point was mooted in the case of *Wilkinson* v. *Adam* (3), in which Lord *Eldon* threw out some suggestions, but said he would leave the point where he found it, without any determination. Since then the question has been decided by the present Master of the Rolls, the only difference being that in that case the provision was made by the reputed father, whereas here it has been made by the mother; and if it be *contra bonos mores* in a reputed father to provide for after-born illegitimate children, it cannot be less so in the case of a mother.

I apprehend that, after the well known case of *Pratt* v. *Mathew* (4), the policy of the law, that a man cannot make a legal bequest to the future children of his marriage with his deceased wife's sister, is clearly established. In the present case

(1) 27 Beav. 73.
(2) Jar. Wills, 3rd ed. vol. ii. p. 228.
(3) 1 V. & B. 422, 468.
(4) 22 Beav. 328.

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two classes of children were mentioned by the testatrix, "legitimate or otherwise," and to hold that the one could take with the other would be a direct encouragement of an unlawful cohabitation.

Now as to the light in which a marriage of this kind is regarded by the law, I would rather take the expression of opinion of the Court of highest authority than declare any view of my own. The case of *Brook* v *Brook* (1), has decided that a marriage with a deceased wife's sister is not to be regarded with greater favour than any other description of illegitimate connection. Lord *Campbell*, then Lord Chancellor, says (2):—"Sitting here as a Judge to declare and enforce the law, I do not feel myself at liberty to form any private opinion of my own on the subject, or to inquire into what may be the opinion of the majority of my fellow citizens at home, or to try to find out the opinion of all Christendom." Again (3): "The marriage we have to decide upon has been declared by the Legislature to be 'contrary to God's law,' and on that ground it is absolutely prohibited"; and further (4): "The Legislature of *England*, whether wisely or not, considers the marriage of a man with the sister of his deceased wife 'contrary to God's law,' and of bad example." Lord *Cranworth* says (5):—"Assuming, then, as we must, that such marriages are not only prohibited by our law, but prohibited because they are contrary to the law of God, are we to understand the law as prohibiting them wheresoever celebrated, or only if they are celebrated in *England?* I cannot hesitate in the answer I must give to such an inquiry. The law, considering the ground on which it makes the prohibition, must have intended to give to it the widest possible operation. If such unions are declared by our law to be contrary to the laws of God, then persons having entered into them, and coming into this country, would, in the eye of our law, be living in a state of incestuous intercourse. It is impossible to believe that the law could have intended this." Lord *St. Leonards* says (6):—"I think that the marriage has no validity in this country on the first ground, for by our law such a marriage is forbidden, as contrary, in our view, to

(1) 9 H. L. C. 193. (4) 9 H. L. C. 218.
(2) Ibid. 209. (5) Ibid. 226.
(3) Ibid. 215. (6) Ibid. 234.

God's law." And Lord *Wensleydale* says (1): "If our laws are binding, or oblige us, as I think they do, to treat this marriage as a violation of the commands of God in Holy Scripture, we must consider it in a Court of justice as prejudicial to our social interest, and of hateful example."

With all these opinions before me, I cannot consider this cohabitation, whether incestuous or not, as anything better than a state of fornication; and I must accordingly hold the rule of the Court to apply.

The declaration must be, that the Plaintiff is solely entitled to the fund.

Solicitor for all parties: Mr. *John B. Sorrell.*

ORD *v.* ORD.

Will—Devise of Share "subject to the same Conditions" by which other Shares were held—Trusts of Settlements.

Testatrix, by her will, after reciting that being joint heiress with her two sisters she was possessed of a third part of the rectorial tithes of *B.*, gave to her sisters the said third part or share, to be equally divided between them, *and to be held by and subject to the same conditions* by which they, her two sisters, held the other two parts or shares.

At the date of the will both of the sisters were married, and on the occasion of the marriage of each, her share of the tithes had been put into settlement:—

Held, that the sisters became entitled respectively to a moiety of the third upon the trusts declared by their respective marriage settlements of the shares originally vested in them in their own right.

SARAH LATHAM, spinster, made her will dated the 2nd of July, 1835, in the following terms:—

"Whereas, being joint-heiress with my two sisters, I am possessed of the third part of the rectorial tithes of the parish of *Bexley*, in *Kent*. Now I give to my dear sisters, *Eliza Dare Ord*, and *Louisa Ord*, the said third part or share, to be equally divided between them, and to be held by and subject to the same con-

(1) 9 H. L. C. 245.

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ditions by which they, my two sisters, hold the other two parts or shares."

The testatrix died on the 13th of August, 1840.

The bill alleged that the sisters did not hold their shares of the tithes or tithe rent-charges subject to any conditions, except such as were contained in their marriage settlements.

Upon the occasion of *Louisa Ord's* marriage, in 1818, with *Henry Gough Ord*, her one-third of the rectory of *Bexley*, and of the glebe lands and tithes, and all other her freehold lands in the parish of *Bexley*, were conveyed to the use (after the solemnization of the marriage, and the death of *Louisa Ord* and her husband), of the children of the marriage, to vest at twenty-one or marriage, as the husband and wife jointly, or the survivor, should appoint.

There were issue of the marriage ten children, of whom eight, four sons and four daughters, attained twenty-one.

The husband of Mrs. *Louisa Ord* died in 1845, and after his death she exercised the power of appointment in favour of her eight children.

Mrs. *Louisa Ord* died in 1863, intestate, leaving her four surviving sons her heirs in gavelkind, and her eldest son, *Harry St. George Ord*, her heir-at-law.

The testatrix's other sister, *Eliza Dare*, in 1819, married *William Redman Ord*, who was still living; and on the occasion of the marriage her one-third of the rectory, glebe lands, tithes, and all her other freeholds in the parish of *Bexley*, were conveyed to trustees to the use of *William Redman Ord* for life, remainder to the use of *Eliza Dare Ord* for life, remainder to the use of the children of the marriage, to vest at twenty-one or marriage, as the husband and wife, or the survivor, should appoint.

There were issue of the marriage six children, of whom five, two sons and three daughters, attained twenty-one.

Joint appointments in favour of the five children were made by *William Redman Ord* and *Eliza Dare* his wife; and in 1858 Mrs. *Eliza Dare Ord* died intestate, leaving her two surviving sons her heirs in gavelkind, and her eldest son, *Charles John William Ord*, her heir-at-law.

Amongst the questions that arose on the construction of the

will, was the following:—Whether by the devise of the testatrix's third share of the rectorial tithes "subject to the same conditions by which my two sisters hold the other two parts or shares," the shares of the testatrix's sisters in the third were to be held subject to the trusts of their marriage settlements respectively.

Mr. *W. M. James*, Q.C., and Mr. *Dickinson*, for the Plaintiffs, the three surviving daughters of Mrs. *Louisa Ord*, and their husbands, and the trustees of the marriage settlements of the four daughters:—

The share of tithes is to be held subject to the settlements. Otherwise no force can be given to the words "by and subject to the same conditions."

Mr. *Druce*, for the Defendants, the three daughters of Mrs. *Eliza Dare Ord*, and the husband of one of them, and the trustees of their marriage settlement, supported the same view.

Mr. *Shebbeare*, for the Defendant, *William Redman Ord*.

Mr. *Wickens*, for the heir-at-law of Mrs. *Louisa Ord*, and Mr. *Swanston*, for the heir-at-law of Mrs. *Eliza Dare Ord*:—

The gift of the rectorial tithes passed the property to the sisters in fée simple freed from the settlements. "Conditions" means the incidents attaching to this particular class of property.

Mr. *Kekewich*, for the co-heirs in gavelkind of Mrs. *Louisa Ord*.

Mr. *Bagshawe*, for the co-heirs in gavelkind of Mrs. *Eliza Dare Ord*.

Mr. *James*, in reply, cited *Ross* v. *Ross* (1); *In re Arthur Palmer* (2).

May 30. SIR W. PAGE WOOD, V.C.:—

The point that remained for consideration in this case was with regard to the gift by the testatrix of her share of tithes to her two

(1) 2 Coll. 269. (2) 3 H. & N. 26.

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sisters, "to be held by and subject to the same conditions by which they, my two sisters, hold the other two parts or shares;" and upon this, I think, I am justified in holding that the sisters took subject to the trusts of their respective settlements; because the true rule of construction is, not to look out for any conditions which may be affixed by law to the estates of the sisters, who hold as tenants in common in the tithes, as to which various questions might arise; but to give effect as far as possible to the words of the will, and to put a construction upon them such as will not render them wholly useless and unmeaning.

In adopting this view, I think I shall be only following the authorities that have been cited.

MINUTES:—Declare, that under the devise of her third share of the said tithes to her sisters *Eliza Dare Ord* and *Louisa Ord*, to be equally divided between them, and to be held by and subject to the same conditions by which they held the other two parts or shares, the same devisees became respectively entitled to one moiety of the said testatrix's third part or share of the said tithes upon the trusts declared by their respective marriage settlements of the parts originally vested in each of them in their own right.

Solicitors for all parties: Messrs. *Bray, Warren, Harding & Warren.*

V.-C. W. 1866 *May* 23, 25.

MENDHAM *v.* WILLIAMS.

Will—Construction—Vested Interest—"Due and Payable."

Testator devised his real estates to his widow for life, and after her death directed the executors to sell, and divide the proceeds equally between his seven children, the shares of his three sons to be vested in them respectively when and as they should attain twenty-one, and the shares of his four daughters to be vested interests in them when and as they attained that age or were married. During the minorities of his children, their shares were directed to be invested and applied for their maintenance and advancement. In case any of the said children should die leaving issue lawfully begotten "before the share of such child or children so dying as aforesaid shall become due and payable," the share was to be equally divided "amongst all the issue of such child or children as and when such issue shall attain the said age of twenty-one years;" the interest of such child's share so dying, leaving issue, to be applied for the advancement, &c., of such issue during minority.

E., one of testator's daughters, married and died in the lifetime of the

testator's widow, leaving an infant child, and having assigned her share by way of mortgage :—

Held, that the words "due and payable," did not postpone the vesting of the share until the death of the tenant for life, and that *E.*'s assignee was entitled, and not her infant daughter under the gift over.

JOHN FAIRWEATHER, by his will, dated the 20th September, 1833, devised all his real estate to his widow and her assigns for and during her life, or so long as she should continue his widow. After the death or second marriage of his widow the executors were authorized to sell all the testator's real estate, and directed to stand and be possessed of the proceeds of the sale upon trust to divide the same equally between the testator's seven children, the shares of his three sons (naming them) to be vested in them respectively when and as they should attain the age of twenty-one years, and the shares of his four daughters to be vested interests in them when and as they should respectively attain that age or be married. After directing that the shares of the children during their minorities were to be invested, and the income applied towards the maintenance, education, and advancement of such minors, the will proceeded as follows :—

"And I hereby direct that in case any one or more of my said children shall die, leaving issue lawfully begotten, before the share of such child or children so dying as aforesaid shall become due and payable (*sic*), shall be equally divided amongst all the issue of such child or children as and when such issue shall attain the said age of twenty-one years. And I direct that the interest of such child's share so dying leaving issue, shall be applied by my said executors and executrix for the respective maintenance, education, and advancement in the world of such issue during their respective minorities."

Testator died in August, 1836, leaving his widow and seven children. The widow (the tenant for life under the will), survived until December, 1862.

Of the testator's seven children, one of them, *Ellen*, attained twenty-one, and married *John Dawson*. She died intestate in 1857, leaving an infant child. Before her marriage her share was assigned to the Plaintiff by way of mortgage, and a further

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charge was created after her marriage by Mrs. *Dawson* and her husband.

The bill was filed by the mortgagee in possession of several of the shares (including that of *Ellen Dawson*) for an administration of the testator's estate, and on the hearing upon further consideration a question arose as to the right to *Ellen Dawson's* presumptive share, between the Plaintiff, as her assignee, and her infant child (served with notice of the decree).

Mr. *Lindley* (Mr. *Rolt*, Q.C., with him), on behalf of the Plaintiff, claimed the share, on the ground that it was indefeasibly vested in *Ellen Dawson* by the terms of the will upon her attaining twenty-one or marriage, and was not divested by her having pre-deceased the tenant for life. He cited *Walker* v. *Main* (1).

Mr. *Brooksbank*, for the infant child of *Ellen Dawson*, contended that there was a clear gift over in favour of the issue of any child that might happen to die before the death of the tenant for life, the period fixed by the testator for payment of the share as something different from and superadded to the mere vesting of the share, which became liable to be divested upon the legatee predeceasing the tenant for life.

Mr. *Lindley*, in reply.

The VICE-CHANCELLOR:—The difficulty that you have to meet is, that if you read "due and payable" as meaning vested, the clause is insensible when applied to daughters, as their share becomes vested immediately on marriage, and therefore they could not have issue and die before it was payable.

Mr. *Lindley*:—The clause must be looked at in its entirety, and is not insensible when applied to sons. In the case of a daughter dying, after the death of the tenant for life, under twenty-one, leaving children, then the gift over might be held to take effect, as in that case, though the share would be vested, she could not give a receipt.

Mr. *Willcock*, Q.C., Mr. *Druce*, and Mr. *Prendergast*, for other parties, took no part in the discussion upon this point.

(1) 1 Jac. & W. 1.

SIR W. PAGE WOOD, V.C.:—

The authorities are clear and uniform to this extent, that when a sum is directed by a testator to be paid at a given epoch, such as the legatee's attaining twenty-one or marriage, coupled with a limitation to some one for life, so that the legacy does not become vested in possession until the death of the tenant for life, and there is also a gift over, the Court has been in the habit of regarding the two circumstances of attaining twenty-one and surviving the tenant for life in the following manner: The first circumstance, that of attaining twenty-one, is considered personal to the donee; and the second, that of surviving the tenant for life, one which affects the arrangement of the estate, by which payment is postponed until after the life estate has determined; and in determining when the share becomes vested, the Court has disregarded the postponement as to the estate, and looked at the personal period only, which is pointed out. The leading authority for this proposition is *Walker* v. *Main* (1), where the cases are collected, the decision being founded on the case of *Emperor* v. *Rolfe* (2), and the principle there laid down as to the desirableness of not postponing the vesting of the interest given, and not making it depend on the accident of the legatee surviving the tenant for life. The Court has always recognized the desirableness of treating every legacy as vested indefeasibly at as early a period as possible, otherwise great hardship might arise from the legatee being left to remain in uncertainty, for a long period of his life, whether he should ever have the legacy or not. The point was discussed in *Jones* v. *Jones* (3), where it was argued that the case was distinguishable from *Emperor* v. *Rolfe*, and the other cases in which "payable" had been held to mean "vested," on the ground that those cases arose, not on wills but on settlements, by which a parent had made provision for his children; and, secondly, that there was no provision (as in *Jones* v. *Jones*) for the issue of the children. Sir *L. Shadwell*, however, was of opinion that "payable" meant attaining twenty-one, and that a son who died in the lifetime of the tenant for life, having attained twenty-one, took a vested interest in the legacy. I think, therefore, that it is too thin a distinction to rely upon for

(1) 1 Jac. & W. 1. (2) 1 Ves. sen. 208. (3) 13 Sim. 561.

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me to say that there is here a gift over to the issue. A difficulty no doubt arises from the testator having mixed up sons and daughters in the gift with reference to issue. In the case of sons, it is impossible to tell whether they will marry under twenty-one or not. In the case of a daughter there is this additional difficulty, that she cannot die leaving issue before her share becomes payable, if payable means vested; but at the same time, if married under age, she cannot give a receipt or deal with her share in any way during her minority. The will is not very carefully framed, and, independently of the omission of some important words, the clause as to issue is not very skilfully worded. Upon the whole, I do not think that I ought to depart in this case from the general rule, and I must hold that this share of *Ellen Dawson* did not become divested by her death after attaining twenty-one in the lifetime of the tenant for life.

Solicitors: Mr. *Andrew Storey;* Messrs. *Brooksbank & Galland.*

V.-C. W. 1866 *April* 21.

In re KIRKBRIDE'S TRUSTS.

Will—Construction—Changing Words—"And" and "or"—Death before receiving Benefit.

Testator bequeathed personal estate in trust to pay the proceeds to his widow for life, and after her death to divide the capital between his brothers *A.* and *B.* and his sisters *C.* and *D.* He declared that in case any of them should die in his lifetime, *and* before they should have received any benefit from the aforesaid bequest, then the share of him or her so dying should be divided among his or her respective children.

A. survived the testator, and died in the lifetime of the tenant for life, having bequeathed his share:—

Held, that "*and*" could not be read "*or*," and that on the death of the testator the share of *A.* was absolutely vested in him, and transmissible by his will.

JAMES KIRKBRIDE, by his will, dated the 14th day of January, 1846, gave and bequeathed his personal estate to trustees upon trust, to pay the interest unto his wife *Jane Kirkbride* for life, and after her decease to stand possessed of the fund upon trust to pay

and divide the same unto and between his brothers *Jonathan Kirkbride* and *John Kirkbride*, and his sisters *Margaret*, since deceased, the wife of *John Cameron*, and *Martha* the wife of *John Liddle*, equally to be divided between and amongst them, share and share alike; and the testator then proceeded as follows: "And my will is, that in case any or either of them the said *Jonathan Kirkbride*, *John Kirkbride*, *Margaret Cameron*, and *Martha Liddle*, shall die in my lifetime and before they shall have received any benefit from the aforesaid bequest, then the share of him or her so dying shall go to and be divided equally between and amongst his or her respective children, if more than one, share and share alike, and if but one then to such one."

Testator died on the 19th of August, 1852, leaving surviving him his wife *Jane*, his brothers *Jonathan* and *John*, and his sisters *Margaret Cameron* and *Martha Liddle*.

Jane Kirkbride, the widow, died on the 10th of December, 1863, and the testator's residuary estate was then realized.

John Kirkbride had died on the 23rd of June, 1854, leaving four sons and three daughters. By his will he bequeathed the residue of his estate to his four sons equally.

This Petition was presented by the children of *John*, and the representatives of such of them as were dead or bankrupt; the question being, whether *John* took a vested interest in one-fourth, in which case his share passed to his four sons under his will; or whether the gift of his share was defeated in consequence of his death in the lifetime of the tenant for life, in which case the Petitioners would be entitled to the share in sevenths under the testator's will.

Mr. *Willcock*, Q.C., and Mr. *W. Brodrick*, for the Petitioners:—

The word "and" must be read "or," in order to give sense to the whole passage, which will then signify—"In case any or either of them shall die in my lifetime, *or* before they shall have received any benefit from the aforesaid bequest," *i.e.*, "shall die in my lifetime, *or* in the lifetime of the tenant for life:" *Jarman* on Wills (1); *Mackenzie* v. *King* (2).

(1) 3rd edit. vol. i. p. 484. (2) 12 Jur. 787; 17 L. J. (Ch.) 448.

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Mr. *Babington*, for the representatives of two of the deceased sons of *John*:—

The Court will not, except in cases of absolute necessity, change "and" into "or." The words "before they shall have received any benefit" may be read as merely supplementary to the former "shall die in my lifetime." The gift to *John* was never divested, and passed under his will.

Mr. *Bagshawe*, for the assignees of two sons of *John* who had become bankrupt:—

The subsequent words are supplementary to the former. If the canon of construction already stated be departed from, and the proposed change be admitted, the difficulties will be increased. The words will then mean either—1, dying in the testator's lifetime; or 2, dying in the lifetime of the tenant for life; or 3, surviving the tenant for life, but dying before the actual distribution and payment of the fund takes place.

Changing words is only resorted to in favour of vesting, not against.

If the retention of "and" renders the second branch of the sentence unnecessary, the change of "and" into "or" will no less turn the former clause into mere surplusage.

Mr. *Willcock*, in reply.

SIR W. PAGE WOOD, V.C.:—

I think upon the whole the sound construction is to adhere to the language of the will. I am invited to read the words "If either, &c., shall die in my lifetime, *and* before they shall have received any benefit," as if they had been "If either, &c., shall die in my lifetime, *or* before they shall have received any benefit;" and, inasmuch as if either should die in the testator's lifetime, he or she would die before he or she had received any benefit, I am asked to deal with the words by analogy to those cases where the expression "dying unmarried *and* without issue" has been read as meaning "unmarried *or* without issue." But, as has been observed, not only would the change of words operate to divest the gift, but it would introduce a third contingency; namely, the death

of the donee before the fund was distributed; an event which might be deferred to an indefinite period after the death of the tenant for life.

It is doubtless extraordinary that the testator should have taken a circuitous mode of expressing a simple thing; but I think the reasonable construction is not to change the words, and thereby put a conjectural meaning on the testator's language, but to read the second paragraph of the sentence as explanatory of the former. The explanation is not wholly without meaning, for the death of the legatee in the testator's lifetime is, in one sense, the only event in which he could die before receiving any benefit. By surviving the testator, he enjoyed a benefit even in the lifetime of the tenant for life, though not in possession; he disposed by will of his reversionary interest, and he might have sold it.

There is, moreover, as Mr. *Bagshawe* has pointed out, an objection to changing the words in this case, which does not arise in the ordinary case of changing "unmarried and without issue" into "unmarried or without issue;" namely, that the change will render the first clause of the sentence inoperative. For these reasons I think the words must not be changed.

The declaration will be, that the legacy or share of *John Kirkbride* vested in him absolutely on the testator's death. The costs of all parties, as between solicitor and client, will be allowed out of the fund.

Solicitors for the Petitioners: Messrs. *Bell, Brodrick, & Lambert.*
Solicitors for Respondents: Messrs. *Gray & Mounsey.*

V.-C. W.

1866

June 20, 21.

MARTIN *v.* MARTIN.

Will—Absolute Gift, followed by inoperative Limitation—A Limitation, void in Law, may be used for the purpose of ascertaining the Testator's Intention.

Testator devised a mixed fund of realty and personalty, after provision should have been made for the payment of his debts, testamentary and funeral expenses, and the legacies, annuities, and payments, thereinbefore directed, upon trust—1, that the same should be equally divided, share and share alike, between his nephews and nieces. He then directed, 2, that the property, whether real or personal, which by that will he left to his nephews and nieces, should, on their decease severally, be divided equally, share and share alike, between such of their children as might survive them. He then continued, 3: "And if either or any of my nephews and nieces should die *before me*, or *before they shall have actually received* what is to go to them under this will, their share shall be divided equally between their children, and in default of children, equally between my surviving nephews and nieces":—

Held, 1. That all nephews and nieces who survived the testator took absolutely. 2. That the limitation over on death before actually receiving was inoperative in law, but that it was legitimate to use it as a means of explaining the intention of the testator.

JOSIAH MARTIN, Esq., by his will, dated the 5th of July, 1842, after giving certain specific legacies and annuities, bequeathed as follows:—

"It is further my intention and will, that all my other property of every description, whether real or personal, after provision shall have been made in the manner hereinbefore above described for the payment of all my just debts, testamentary and funeral expenses, as well as the legacies, annuities, and payments hereinbefore directed, shall be equally divided, share and share alike, between my nephews and nieces, the children of my late brothers, Sir *Henry* and Sir *Byam*, except my nephew, Sir *Henry*, the son of my late brother, Sir *Henry*, who has now come into possession of the *Green Castle* and *Rigby Estates*, in the island of *Antigua*, which, I apprehend, will place him in better circumstances than any of my other nephews and nieces; my sole motive in making this exception is, that I may act fairly and impartially to all my nephews and nieces.

"And it is further my will that the property of whatever description, whether real or personal, which by this will I leave to my nephews and nieces, shall, on their decease severally, be divided equally, share and share alike, between such of their children as may survive them, and if either or any of my nephews and nieces should die before me or before they shall have actually received what is to go to them under this will, that, in any and every such case or cases, their share shall be divided equally, share and share alike, between their children, and in default of children, equally between my surviving nephews and nieces, and the several sums of £20,000, £2000, and £500, hereby directed to be reserved in the government securities for the purpose of paying the annuities directed to be paid to my sister, *Lydia Eliza D'Esterre*, and Mrs. *Leeks*, shall, on their decease, severally follow the same destination as the property bequeathed to my nephews and nieces prior to the decease of the aforesaid annuitants, viz.: shall go to my nephews and nieces in equal shares, and in the same manner as before directed, to such of their children as may survive them."

By a codicil to his will, dated the 4th of December, 1845, testator directed as follows:—

"I hereby declare that in consequence of my nephew, Sir *Henry*, having relinquished possession of the *Green Castle* and *Rigby* property, it is my will that he shall stand in the same situation with respect to my property as all my other nephews as well as nieces do under the preceding will, viz.: that notwithstanding any exception made in the body of the preceding will he shall be entitled with regard to my property of every description to share equally with my other nephews."

One of testator's nephews, *Robert Fanshawe Martin*, died in the testator's lifetime, without having had any issue.

The testator died on the 5th of December, 1849.

The following nephews and nieces survived: Sir *Henry W. Martin*, who died without having had issue on the 4th of December, 1863; *Catherine Elizabeth*, the widow of the Rev. *George May*, who had two children, *Henry W. May*, who was of age, and *Anne E. C. May*, an infant; Sir *William F. Martin*, who had eight children, all infants; Sir *Henry Byam Martin*, who died in

V.-C. W. 1866 MARTIN v. MARTIN.

February, 1865, having never been married; Lady *Catherine Martin*, the widow of Sir *Henry W. Martin*; *Williamina M. Martin*, spinster; and *Elizabeth Ann Martin*, who was married to *Francis John Davies*, and died on the 24th of March, 1863, leaving four children, of whom three were of age, and one an infant.

In July last a Petition was presented to the Court, by Sir *William F. Martin*, against the other living nephews and nieces, the children of the nephews and nieces who had survived the testator, and the representatives of the surviving nephews and nieces who were dead, praying for the opinion of the Court as to the interest which the nephews and nieces who survived the testator took in the residuary estate, and whether such interests were liable to be divested wholly or partially, and to what extent, in any and what events, and in whose favour? what interests the children of such nephews and nieces took in the residuary estate, and who were the persons now entitled to, or interested in, the share which *Robert F. Martin* would have taken if he had survived the testator, and for what estates and interests therein?

On the 27th of July last, His Honour directed the Petition to be set down for hearing as a special case, and the above questions were now argued.

Mr. *E. L. Pemberton*, for the Plaintiff.

The *Attorney-General* (Sir *R. Palmer*), Mr. *G. M. Giffard*, Q.C., and Mr. *T. C. Wright*, for Lady *Catherine Martin*:—

The true construction is, that the interests are absolute in such of the nephews and nieces as survived the testator, and that there is no gift to the children. There is, first, an absolute gift to all the nephews and nieces equally. Then comes a clause providing that the property, on the decease of the nephews and nieces, should be divided equally "between such of their children as might survive them." Stopping there, that clause, if it stood alone, might possibly cut down the interests of the nephews and nieces to life interests; but the testator goes on to say, and the words are plainly expository of the former, "And if either or any of my nephews and nieces should die *before me*, or *before* they *shall have actually received* what is to go to them under this my will, their

share shall be divided equally, share and share alike, between their children, and in default of children, equally between my surviving nephews and nieces." Now of the two contingent limitations there specified, only one is legally valid, namely, that upon death in the testator's lifetime. The testator intends to exclude every contingency except that which he has mentioned; and the further words, though without legal force, may be referred to as throwing additional light upon his intention.

The most recent decision on similar words is *In re Arrowsmith's Trusts* (1), where personalty was bequeathed upon trust, after payment of two legacies, to divide the same between all testator's nephews and nieces then living, with a proviso, that in case of the death of any of the nephews and nieces "before receiving their respective shares," the share or shares should go and be paid to and amongst all the surviving nephews and nieces, share and share alike;" and it was insisted that the testator intended to exclude those who pre-deceased him, but the Vice-Chancellor *Kindersley* observed that such a construction would make the clause useless, and further remarked, that the testator might have used the simple phrase "die before me;" and His Honour held that the shares of those of the nephews and nieces who died before the "proper time of payment" (*i.e.* one year after the testator's death) were divested, and went over. But there is great and reasonable doubt whether that rule of interpretation is to be incorporated into this will. The intention of the testator seems to have been, that if a nephew or niece died before his or her share had actually been received by him or her, not if he or she died before the time for receiving it arrived, it was to go over.

In *Hutchin* v. *Mannington* (2), where the legacy was given over in case of the death of the legatee "before he may have received it," Lord *Thurlow* said it must be considered as vested from the death of the testator. This decision was followed in *Stapleton* v. *Palmer* (3). In *Holmes* v. *Godson* (4), where there was an absolute devise in fee, to vest at twenty-one with a gift over in the event of the devisee attaining twenty-one without having made a will, the gift over was held repugnant and void. In this instance the gift

(1) 2 D. F. & J. 474; 2 L. T. (N. S.) 453, 456. (2) 1 Ves. 366.
(3) 4 Bro. C. C. 490. (4) 8 D. M. & G. 152.

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over in the event of death "before receiving" must be held repugnant to the absolute gift to the nephews and nieces, and therefore void.

Another class of cases is that where the period at which the devisee is to be entitled to payment is expressly stated. Of this *In re Williams* (1), is an example, following *Jeffreys* v. *Reynous* (2). In that case the shares were to be paid at twenty-one or marriage, unless in the lifetime of the parents, in which case they were to be paid at the death of the survivor; and it was provided that if either of the objects of the gift died before becoming entitled to payment, the share was to go over. One of the objects of the power attained twenty-one, but died in the lifetime of the parent. It was held that the gift over was inoperative.

This construction is to some extent supported by the codicil.

[Reference was also made to *McLachlan* v. *Taitt* (3), and *Hayward* v. *James* (4).]

Mr. *Rolt*, Q.C., and Mr. *Faber*, for the children of the nephews and nieces:—

The first part of the will is extremely clear. There is a gift to the nephews and nieces; and then it is equally clear there is a gift, upon their decease, to those of their children who survive.

It is first to be observed that the word "receive" is not applicable to real estate. It must refer either to personalty or to income, and as the fund is a mixed fund of realty and personalty, the presumption is, that the testator was referring to income, thereby indicating that estates for life were all that he intended the nephews and nieces to take.

The real question is—what did the testator mean? He contemplated, 1, the death of a nephew or niece, leaving children; 2, death before himself; 3, death after himself, but so soon after as that the money could not be got in (the period of twelve months being allowed). In that case he says their children shall come in. But it is argued—"The law says it cannot recognize that; no effect can be given to those words at all; if that is what the

(1) 12 Beav. 317.
(2) 6 Bro. P. C. 398.
(3) 2 D. F. & J. 449.
(4) 28 Beav. 523.

testator meant he used it as an interpretation clause of what goes before; it cannot be meant as an integral clause."

But does the law establish any such doctrine? No doubt there is a general rule, but is it universal? Here the property to be "received" was the residue after payment not only of debts and legacies, but of annuities and deferred payments, where by no possibility could the residuary legatees become entitled to receive until after the death of the annuitants, or until the happening of uncertain events. Is not that sufficient to shew that this cannot be accepted as an interpretation clause, but that it is in fact an integral clause?

But if not, there is another construction, which is this, that the words, "die before they shall have actually received," are equivalent to and merely expository of the former, "die before me," *i.e.*, die before coming into possession or receipt of the estate.

The VICE-CHANCELLOR referred to the rule in *Randfield* v. *Randfield* (1).

Mr. *Faber*:—The second provision in this will, the cutting down clause, is equally clear with the preceding absolute gift.

The *Attorney-General*, in reply.

SIR W. PAGE WOOD, V.C.:—

I have felt a great deal of doubt, but only in one respect, namely, as to the application of that rule of construction which says, that where you find a gift in clear and express terms, you are not to permit subsequent and less distinct words to throw a doubt upon the former clear expressions. I cannot come to the conclusion that the clear and express gift to the nephews and nieces in this case is displaced by the subsequent words. I hold, that there was a clear gift to the nephews and nieces, and that, if there is any substitution at all, it is only to the children of those nephews and nieces (if any), who died in the testator's lifetime leaving children. That was the conclusion at which I arrived on the former occasion; and that conclusion is supported by the decision of *Harrison* v. *Foreman* (2); and *Campbell* v. *Brownrigg* (3).

(1) 8 H. L. C. 225. (2) 5 Ves 207. (3) 1 Ph. 301.

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The only question is, how far this subsequent clause has cut down the previous gift with regard to those nephews and nieces who have survived the testator, and have had children? It is not entirely sound reasoning to say, that the limitation which follows after the gift to the nephews and nieces, namely, that "in any and every such case or cases their share shall be divided equally, share and share alike between their children," is to be taken by the Court to cut down the absolute gift to the nephews and nieces; because the first and clear gift is that which directs all his personal property to be divided, share and share alike, between those nephews and nieces, with the exception of one. Then, further on in the will, is a direction that if in some event (which I have to consider afterwards), that gift to them and their children should not operate, what fails is to go over "equally between my surviving nephews and nieces"—not "between them *and their children*"—there is no mention whatever there of children who are to take in succession. Then the direction in the codicil, although not in any way conclusive, is still a continuation of the attempt to express the same absolute form of bequest as that previously contained in the will. The testator directs in his codicil, that the formerly excluded nephew shall stand "in the same situation" with respect to all his property as all his other nephews and nieces, namely, that he shall share equally with his other nephews. Of course, the words "in the same situation," are somewhat ambiguous; they might mean a limitation to himself and his children; but the meaning is sufficiently explained by the words that follows—"to share equally with my other nephews," without mentioning again their children. Therefore, the first primary gift is to the testator's nephews and nieces.

Then come these words, which create the whole difficulty: "I direct that all my property, whether real or personal, which by this my will, I leave to my nephews and nieces"—(again, in the terms of an absolute gift to them)—"shall on their decease, severally, be divided equally, share and share alike, between such of their children as may survive them." Of course it is quite correct to say, that the clause standing there alone, would cut down that which before was absolute to an interest in the nephew

or niece for life, with remainder to his or her children who may survive him or her. But further on, I find the sentence reads thus: "And if either or any of my nephews and nieces should die *before me, or before they shall have actually received* what is to go to them under this will, that in any and every such case or cases, their share shall be divided equally, share and share alike, between their children, and in default of children, equally between," again, "my surviving nephews and nieces," not saying anything at all about the children of those nephews and nieces. Now these words, "actually received," do, to my mind, irresistibly demonstrate the intention of the testator. It is this: "I give absolutely to my nephews and nieces—they may never receive that share" (I will consider how he puts that more particularly presently): "but if they never receive that share, then it is to go over to their children; or, if they have no children, it is to go over to the surviving nephews and nieces." When I say, "never receive that share," it presents itself to the testator's mind in two ways—"They may die before me, or, though they may survive me, they may die before the shares are paid over to them." I have no doubt that was in his mind; and if the law could effect it, operation ought to be given to the clause; but although the law will not allow these words to operate, I quite agree with Mr. *Rolt* in the observation, in which, I think, the Attorney-General concurred, that words which the law will not allow to have operation may yet be used to explain the intention of the testator. The intention of the testator seems to have been, that in the event, and only in the event, of his nephews and nieces being out of the way, so as not to be able to receive absolutely, then it was to go over to their children, and, if none, then over to the surviving nephews and nieces. It is a common impression on testators' minds that the event may occur of death before actual receipt of property given. The law has interfered on account of the extreme difficulty of meeting such a wish. In the case of *Hutchin* v. *Mannington* (1), Lord *Thurlow* uses the expression, "It is an immeasurable purpose." In *Hutchin* v. *Mannington* the case was that of remittances from a distant place not arriving to give effect to the testator's intention till some time after the

(1) 1 Ves. 366.

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legatee's death. Lord *Thurlow* said you cannot measure that intention. One executor may be more active than another, and get the assets in quicker than another; there may be a debtor to the estate, and he may not pay his debts so quickly as might be expected: you cannot tell when the assets will be actually collected, and the Court cannot give effect to the testator's intention that, if the legatee should die before the property is actually received, it should go over, but gives it to him absolutely.

It is impossible to adopt Mr. *Rolt's* construction, that the words "before they shall have *actually received* what is to go to them," signify, before they shall have actually become entitled to what is given to them, namely, a life interest in a share, which on their death is to go over to their children. The plain and manifest intention is, that they are to receive the absolute interest. Then comes the settling clause. That clause must be taken as one entire clause, and the question is, what does the whole of that clause mean? Does it mean to cut down the absolute interest already given, so that the nephews and nieces, during their whole lives, if they have children, are not to enjoy it absolutely; or are those words which follow, "on their decease between such of their children as may survive them; and if either of them shall die in my lifetime, or before they shall have actually received what is to go to them, their share shall be divided equally between their children, and in default of children, then to my surviving nephews and nieces" —are those words explanatory of that limitation, "on their decease to such of their children as may survive them?" is that first expression, "on their death to their children," to be taken absolutely, and not to be qualified by what follows? One cannot help observing that the clause "if any or either should die before they shall have actually received what is to go to them" is complete surplusage in one point of view. After the testator had said it was to go over to their children in every event, it was needless for him to have put in that clause about their dying before they shall have actually received; because I think the words "dying before they shall have actually received" contemplate something different from their dying before the testator; and if that be so, then, if I am to interpret the former gift as a limitation to them for life, and then to their children, those latter

words are absolute surplusage. If the nephews and nieces survive him, they must actually receive; it will go to them for life, and afterwards to their children, either in one case or in the other.

With regard to the language not being applicable to real estate, but being appropriate to a mixed fund of realty and personalty, no doubt attention is to be paid to that observation; and to the circumstance that they have only been receiving rents and profits. Still, if they have been receiving rents, they have been receiving them in such a way as that they could sell the estates the next hour and pocket the money; and I cannot understand those words, "before they have actually received what is to go to them," as meaning anything else than this, that he did contemplate that the nephews and nieces would, under the former clause, receive and have in their hands, in some form or other, the whole fund in a way as that they might absolutely dispose of it.

It appears to me the whole scheme of the will is this:—"I give it to them absolutely, but there may be events in which it never will reach them; of two events on which the limitation over depends, death in my lifetime, and death before they have received the fund, the law says, one only can be effective; if they die before him, then it goes over, but in every other case the actual gift prevails. I cannot say the case is not one of difficulty, but the true construction appears to be, that the absolute gift is complete as to those who survived the testator.

The answer to the first question is, that the nephews and nieces who survived the testator take absolute interests. The answer to the second question will be, that the children take none. And the answer to the third question will be, that the surviving nephews and nieces take the share of that nephew who pre-deceased the testator.

The costs will come out of the fund.

Solicitors: Messrs. *Pemberton, Meynell, & Pemberton.*

V.-C. S.

1866

March 22.

12 LJ Ch 642
650-2-4
12 Ch D 836
18 CLD 222

WHITMAN *v.* AITKEN.

Will—Construction—Vesting—Paid or payable.

Bequest "to my nephew, *A.*, £2000, and in case of his death before the same shall be actually paid or payable to him," the trustees to stand possessed thereof for his children at twenty-one; and in case no child of *A.* should acquire a vested interest then over. Testator appointed his widow and *A.* executors, and both proved; but *A.* died three months after testator, before any part of the legacy was paid or appropriated, leaving one child only, who died an infant:—

Held, that the representative of *A.* was not entitled, and that the gift over took effect.

DAVID AITKEN, by his will, dated the 28th of April, 1856, having bequeathed certain annuities, gave to his widow and his nephew, *D. M. Aitken*, all his real and personal estate upon trust for conversion and investment, and for payment of such annuities. The testator then proceeded as follows:—"I give to my nephew, the said *David Maxwell Aitken*, £2000, and in case of his death before the same shall be actually paid or payable to him, then the trustees or trustee for the time being of this my will shall stand possessed thereof, or the securities whereon the same shall be invested, in trust for all the children of the said *David Maxwell Aitken*, whether born in my lifetime or after my decease, who being a son shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, in equal shares or proportions, and in case there shall be only one such child, then for such one child, and in case no child of the said *G. M. Aitken* shall acquire a vested interest then in trust in like manner for all the children of my nephew, *J. M. Kitson Aitken*." As to the residue, the testator bequeathed one-third part to his wife, and the other two-thirds to his nephew, *D. M. Aitken*, absolutely, and then followed these words: "But in case my said nephew, *D. M. Aitken*, shall depart this life before his share of the residue shall be actually paid or payable to him, then my trustees shall stand possessed thereof for his children." Then followed a trust in default of children, in the same terms as above in respect of the sum of £2000. The testator made two codicils to his will, which did not affect this

question, and appointed his widow and *D. M. Aitken* executrix and executor of his will.

The testator died on the 2nd of September, 1856. The widow and *D. M. Aitken* proved the will in the Prerogative Court of *Canterbury*, but the widow alone proved in the Exchequer Court of *York*.

On the 4th of December, 1856, three months and two days after the testator's death, *D. M. Aitken* died, leaving a widow and one infant daughter him surviving. At the time of his death no part of the assets had been paid or appropriated in respect of *D. M. Aitken's* legacy of £2000, or of his share in the residuary estate.

The infant daughter of *D. M. Aitken* died in November, 1861, aged six years.

The executor of *D. M. Aitken* claimed the legacy as having vested on the death of the testator. The children of *J. M. Kitson Aitken* also claimed as on failure of the prior gift. In consequence of these conflicting claims the trustees filed this bill to administer the testator's estate, and on the 24th of June, 1865, the usual administration decree was made. On the 31st of January, 1866, the Chief Clerk made his certificate finding the facts, and the cause now came on upon further consideration.

Mr. *Cole*, Q.C., and Mr. *Bristowe*, for the trustees, submitted the question to the Court.

Mr. *Malins*, Q.C., and Mr. *Speed*, for the executors of *D. M. Aitken*:—

The will takes effect from the testator's death, and the legacy then becomes payable. It is a mere rule of convenience that allows the representative a year to ascertain the state of the assets, a privilege of which he is not bound to avail himself. In many cases executors have wound up the estate before the expiration of the year; and it would be their duty to do so where the assets and liabilities are ascertained sooner. It has never been held that this rule of convenience can vary the rights of the beneficiaries. If the Court acceded to the claim made on the other side it would be making the construction of the will depend on the diligence of the executors. In *Cort* v. *Winder* (1), the words were "due or payable," but the

(1) 1 Coll. 320.

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Court held that they had reference to the death of the testator, and that the interest vested. In *Hallifax* v. *Wilson* (1) the property given was subject to a subsisting life estate, and the words were, to pay and transfer to the legatee at twenty-one, with a gift over in case of death before the shares became payable, but the Court held that the gift vested at twenty-one, before the death of the tenant for life. In *Re Yates' Trusts* (2) the gift was to testator's daughter for life, and from her decease to pay the principal to her sons at twenty-one, and her daughters at twenty-one or marriage; and in case any of her children should die before being entitled in possession, then over; and it was held that the representative of a child who attained twenty-one, and died in the mother's lifetime was entitled. In *Collins* v. *Macpherson* (3), the gift was to such of testator's daughters as should be living at the death of his widow, provided that if any should be then dead, or die before her share should become payable or divisible, leaving a child, then to such child. The testator's wife having died in his lifetime, it was held that a daughter who survived the testator three months took a vested share. In *Jones* v. *Jones* (4) "payable" was held to mean attaining twenty-one. In *Butterworth* v. *Harvey* (5) the testator directed the principal, from the death of the tenant for life, to be divided among the children of *M. H.* living at her decease, when the youngest should attain twenty-one, if the annuitants were then dead, and until then, to apply the surplus for maintenance, but in case any of the children who should become entitled to a distributive share, should die before such share should become payable, then to the issue. One of the children attained twenty-one, and died in the lifetime of the annuitant leaving issue, but the Court held, that the share vested in the child at twenty-one. In *Powis* v. *Burdett* (6) the share was held vested, though the words were not nearly so strong as these.

On these grounds it is submitted that the representative of *D. M. Aitken* is entitled.

Mr. *Hinde Palmer*, Q.C., and Mr. *C. J. Hill*, for *Elizabeth Aitken*,

(1) 16 Ves. 168.
(2) 16 Jur. 78.
(3) 2 Sim. 87.
(4) 13 Sim. 561.
(5) 9 Jur. 999.
(6) 9 Ves. 428.

one of the children of *J. M. Kitson Aitken*, and Mr. *Greene*, Q.C., and Mr. *Fischer*, for the other children in *Australia*, were not called on.

SIR J. STUART, V.C.:—

Where the language is ambiguous the Court will undoubtedly look to the context to ascertain the testator's meaning, and even where the words are clear in themselves they may be controlled by the context. But the first rule of construction is, that where the language of the testator is clear, and involves no inconsistency or contradiction with other parts of the will, those clear words must prevail.

In this case the literal meaning is perfectly plain and rational, and must have its due effect. The gift is to *D. M. Aitken*, but if he dies before it is actually paid or payable, then the property is to be held for his children. It is admitted that the legacy was not paid. Then what is the meaning of the word payable? That refers to the death of *D. M. Aitken* in the lifetime of the testator.

It is therefore plain that there were two events, upon the happening of either of which the gift to the children was to take effect. If *D. M. Aitken* should die in the lifetime of the testator, the legacy is not payable, and his children are to take it. If he survives the testator, but dies before the legacy is actually paid to him, his children are to take.

This case cannot be governed by any of the cases cited, for in them the words were different.

Powis v. *Burdett* (1), was decided on a totally different principle. The instrument in question there was a marriage settlement, and there was of course valuable consideration. Lord *Eldon* referred to the case of *Woodcock* v. *The Duke of Dorset* (2), in which Lord *Thurlow* did great violence to the language of the testator in order to hold that the share was vested. This is a wholly different case, and there must be a declaration that the gifts over take effect.

Solicitors for the Plaintiffs, and Defendant *Elizabeth Aitken*: Messrs. *Fielder & Sumner*.

Solicitors for Executors of *D. M. Aitken*: Messrs. *West & King*.

Solicitors for *Kitson Aitken*: Messrs. *Tamplin & Taylor*.

(1) 9 Ves. 428.

(2) 3 Bro. C. C. 569.

V.-C.-S.
1866
June 8, 11.

SLANEY *v.* WATNEY.

Executor, Gift to, in that character.

Devise of real estate "to my friends" *A. B.* and *C.* on certain trusts. Bequest of a sum of stock to *A. B.* and *C.* "my executors hereinafter named," upon trust for *M.* for life, and then to *A. B.* and *C.* in equal shares "for their own respective absolute use and benefit." Further legacy of £200 "to each of my executors," in acknowledgment of trouble in execution of will. Appointment of *A. B.* and *C.* executors :—

Held, that an executor and trustee who never acted was not entitled to share in the bequest of stock.

THOMAS FEWSON EAGLES, by his will, dated the 11th of November, 1841, after directing all his just debts to be paid, made the following disposition :—

"I give and devise unto my friends, the Rev. *E. Prodgers*, *John Watney*, and *E. Harvey*, all my lands and hereditaments, on trust to sell the same and to stand possessed of the moneys arising therefrom upon the trusts declared of my residuary personal estate." The testator then gave certain pecuniary legacies, and proceeded thus: "I also give to the said *E. Prodgers*, *J. Watney*, and *E. Harvey*, my executors hereinafter named, their executors, administrators, and assigns, £875 consols upon trust during the life of *L. Martin* to pay to her the dividends for life to her separate use. Then I give the said sum to the said *E. Prodgers*, *J. Watney*, and *E. Harvey*, in equal shares, for their own respective absolute use and benefit." Then, after several legacies, the testator proceeded thus: "I give to each of the executors of this my will the further sum of £200, of which I request their acceptance as an additional acknowledgment for the trouble they may have in the execution thereof. All the said legacies to be free of legacy duty." *Prodgers*, *Watney*, and *Harvey*, were appointed executors.

The testator died in January, 1843, and his will was proved by the two executors, *Watney* and *Harvey*, power being reserved to *Prodgers* to prove. *Prodgers*, however, never accepted the devise, or in any manner acted in the execution of the trusts of the will.

He died on the 5th of December, 1861. On the 1st of November, 1865, the tenant for life died, and the fund became divisible. The parties beneficially interested in the residue now presented this Petition for payment to themselves out of Court of the one-third share of the stock given to *Prodgers*, and of the other two-thirds to the two executors.

Mr. *Dickinson*, for the trustees, submitted the question to the decision of the Court.

Mr. *Swanston*, for the residuary legatees:—

This is a gift to the executors in respect of their office. It is not necessary that the legacy should be given to the legatee as executor: *Calvert* v. *Sebbon* (1). In *Dix* v. *Reed* (2), Sir *John Leach* said, "*primâ facie* legacies to executors are considered as annexed to the office, and they are to show circumstances to repel the presumption." Adopting that principle, it is clear this legacy was dependent on the executor accepting the office.

[The VICE-CHANCELLOR:—Is there any case where the gift is to the trustees in which it has been held annexed to the office?]

In *Piggott* v. *Green* (3), the gift was to the executors and trustees, and that circumstance was noticed in the judgment; but the Court held, nevertheless, that an executor who did not act was not entitled.

Mr. *W. C. Harrison*, for the representative of *Prodgers*:—

In this case the executor and trustee never renounced or declined to act, but simply abstained from doing anything. In *Re Denby* (4), the words were, "to my friend and one of the executors of my will;" but that was held not conditional on the acceptance of the office.

June 11. SIR J. STUART, V.C.:—

In this case the bequest was clearly annexed to the office, and,

(1) 4 Beav. 222.
(2) 1 S. & S. 239.
(3) 6 Sim. 72.
(4) 3 D. F. & J. 350

V.-C. S. 1866 SLANEY v. WATNEY.

therefore, the executor and trustee who never acted is not entitled.

Solicitors for the Trustees: Messrs. *McLeod, Stenning, & Watney.*

Solicitors for the *Cestui que Trust*: Messrs. *Randall & Son.*

Solicitor for the Representative of deceased Executor: Mr. *Greenbank.*

V.-C. S. 1866 *May* 24.

BARLOW *v.* McMURRAY.

Practice—Amendment—Parties.

Under an order to amend by adding parties, a Plaintiff is not at liberty to introduce allegations making a new case against the original Defendants, though material as to the new Defendant.

THE allegations of the bill were briefly as follows:—

Prior to October, 1860, *J. G. Shipley* was the registered owner and publisher of the *Sporting Life* and the *Eclipse* newspapers. *Shipley* was at that time indebted to the Defendant *McMurray* and other persons, and on the 13th of October, 1860, filed a petition to the Court of Bankruptcy for a private arrangement, alleging his debts to be £11,479 4*s.* 3*d.* The petition failed. In October, 1860, as the bill alleged, in consequence of a creditor threatening to issue execution, *Shipley* determined to present his own petition in bankruptcy; but in order to secure *McMurray* he accompanied *McMurray* and one *Hutton* to *Somerset House*, and caused the registration of the *Sporting Life* in his own name to be cancelled, and the newspaper to be registered as follows:—

"*F. G. Kelly*, printer and publisher; *J. G. Shipley* and *John Hutton*, sole proprietors, subject to two mortgages to *William McMurray* on the share of *J. G. Shipley*."

The bill alleged that *Hutton* claimed a moiety of the newspapers by virtue of two deeds, dated respectively the 17th of April and 15th of June, 1860, whereby he alleged that *Shipley* sold one moiety of the *Sporting Life* and the *Eclipse*, and of the leasehold premises, for £2000. *McMurray* alleged that he held two mort-

gages, one dated the 22nd of February, 1860, by a transfer dated the 4th of October, 1860, from one *Wrigley*, for £800, and another for £3500, by a deed dated the 22nd of September, 1860. On the 6th of February, 1861, *Shipley* was adjudicated a bankrupt, and on the 19th of February, 1861, the Plaintiffs and the Defendant *McMurray* were appointed assignees.

The bill then alleged that on the 16th of February, under the powers of sale in his mortgage deeds of the 22nd of February, 1860, and the 22nd of September, 1860, and the 4th of October, *McMurray* agreed to sell to *Hutton*, *Shipley's* moiety of the *Sporting Life* and the *Eclipse*, and of the leasehold premises in *Fleet Street*, for £1500. On the 19th of February, 1861, the Defendant *McMurray* proved against *Shipley's* estate for £3009 7*s.* 9*d.*, having given credit for the £1500. At this time *Hutton* owed to *McMurray*, as he alleged, £10,000. The bill alleged that *McMurray* well knew at the time he entered into the agreement with *Hutton* that £1500 was a wholly inadequate price for the property, and that *McMurray* in fact, shortly after the said agreement, sold to *S. O. Beeton* the property agreed to be sold to *Hutton*, together with a moiety of a paper called the *Sporting Telegraph*, of trifling value, for the sum of £4325. No part of the price was received by *Hutton*, but the whole was appropriated by *McMurray* to the discharge of *Hutton's* debt to himself. The bill alleged that *McMurray* arranged and contrived the sale to *Hutton* for the purpose of obtaining, at the expense of the bankrupt's estate, a portion of the debt due from *Hutton* to *McMurray*. The bill then set forth the correspondence containing the agreement between *Beeton* and *McMurray*, dated the 1st of March, 1861, and stated the removal of *McMurray* from his office of assignee.

The original bill alleged that the Defendant *McMurray*, and *Hutton*, well knew that it was certain, or in the highest degree probable, that *McMurray* being the largest creditor would be appointed one of the assignees of *Shipley's* estate, and that he was so appointed, notwithstanding the opposition of the creditors, and prayed for a declaration that *McMurray* should account for the difference between the £1500 and the value of the property sold to *Beeton* (less what was not included in the sale to *Hutton*) and for an account on the footing of such declaration.

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On the cause coming on to be heard, on the 23rd of April, an objection was taken that *Hutton* was a necessary party to the suit, and that the bill ought to be dismissed with costs. His Honour allowed the objection for want of parties, but directed the cause to stand over, with leave to the Plaintiff to amend the bill by an order of which the operative part was in the following terms:— "This Court doth order that this cause do stand over, with liberty to the Plaintiffs to amend their bill by adding parties thereto as they shall be advised." The Plaintiff accordingly amended the bill by making *Hutton* a Defendant, and also introduced, among others, the following paragraph:—

"14 (*a*). It is, however, the fact, that on the 24th day of January, 1861, the Defendant *William McMurray* agreed to sell the said newspapers called the *Sporting Life*, and the *Eclipse*, and *Sporting Telegraph*, to the said *S. O Beeton* for £8000, but shortly after that time the said Defendant *William McMurray* required the said *S. O. Beeton* to give £650 more for the said newspapers, in order to cover the value of the lease of the premises in *Fleet Street*, where they were published, and of certain plant, type, office-fittings, and furniture, and to repay him £300 or thereabouts, which he said he had paid for the *Sporting Telegraph*. The said *S. O. Beeton* agreed to these terms, but the Defendant *William McMurray* did not at once carry them out, for if he had done so he would not have been able to carry into effect the scheme which he then contemplated, whereby he secured the right of proof against the bankrupt's estate and the power of carrying the choice of assignees."

This paragraph referred to certain correspondence between *Beeton* and *McMurray*, in January, 1861, in which *McMurray* agreed to sell the three newspapers to *S. O. Beeton* for £8000, and which was proved in the cause.

The *Attorney-General* (*Sir R. Palmer*), for the Defendant *McMurray*, now moved that the Plaintiff's re-amended bill be taken off the file, or that paragraph 14 (*a*) be struck out, and that the Plaintiff pay the costs of the application.

The order made by His Honour simply authorized the Plaintiff to amend his bill by adding *Hutton*, who, the Defendants con-

tended was a necessary party, but the Plaintiff, in paragraph 14 (*a*), had made a new case against the original Defendant *McMurray*. This was not authorized by the order or by the practice of the Court. Even in the time of Lord *Hardwicke* the practice of the Court on this point was settled. In *Goodwin* v. *Goodwin* (1) Lord Chancellor *Hardwicke* said: "After publication is passed, and the cause set down, you can only amend by making parties, and cannot introduce new charges or put a material fact in issue which was not so in the cause before, but should have preferred a supplemental bill." This was exactly what the Plaintiff had done here; he had put a new fact in issue, viz. the sale to *Beeton* in January, 1861, which was not only not in issue before, but which was inconsistent with the allegation in the original bill that the sale took place in March, 1861. Again, in *Watts* v. *Hyde* (2), Lord *Cottenham* said, "the rules which regulate pleading and the conduct of a cause, and particularly the taking of evidence, are framed for the purpose, as far as possible, of enabling both parties to bring their case fairly and fully before the Court and to guard against those dangers, particularly with respect to evidence, which the mode of proceeding in equity is too much calculated to produce." These objects would be defeated and these guards become inoperative if a new case were permitted to be made at the hearing. In *Gibson* v. *Ingo* (3) the rule was pointedly laid down that leave to amend by adding parties does not authorize a Plaintiff to introduce by amendment any new charge against the original Defendant.

Mr. *Bacon*, Q.C., and Mr. *Swanston*, on the same side, and Mr. *Fry*, for *Hutton*, were stopped by the Court.

Mr. *Karslake* (Mr. *Malins*, Q.C., with him), for the Plaintiff:—

Gibson v. *Ingo* (3) is an authority against the motion, because it establishes that a Plaintiff under the authority of leave to add parties is entitled to add such allegations as may be necessary to connect the new party with the case. *Goodwin* v. *Goodwin* (1) does not apply, because no new case is made against *McMurray*; but even if it were, it would be no objection, provided the allegations

(1) 3 Atk. 370. (2) 2 Ph. 406—409. (3) 5 Hare 156.

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were material as to the new Defendant: *Milligan* v. *Mitchell* (1); *Minn* v. *Stant* (2).

The paragraph complained of is most material as to *Hutton*, because *Hutton* being made a Defendant on the ground that the bill impeaches his title under the sale of 1861, which was a mere equity, it is most important to show that *Hutton's* equity, supposing it existed, is subject to a prior equity in *Beeton* under the agreement in January, 1861.

But, in fact, the amendment makes no new case against *McMurray*. The case made by the bill is, that he, with full knowledge of the actual value, for purposes of his own, sold the property at an undervalue to *Hutton*. All that the paragraph does is to add a new piece of evidence in support of the case made by the bill.

SIR JOHN STUART, V.-C.:—

There is no pretence for this amendment, which is unauthorized by the terms of the order, and is not sanctioned by the practice of the Court. The paragraph 14 (*a*) must be expunged, and the Plaintiff must pay the costs of the application.

Solicitors for the Plaintiff: Messrs. *Benham & Tindell.*

Solicitors for the Defendant *McMurray*: Messrs. *Linklaters, Hackwood & Co.*

Solicitors for the Defendant *Hutton*: Messrs. *Rogerson & Ford.*

(1) 1 My. & Cr. 433. (2) 15 Beav. 129.

MARTIN *v.* HEADON.

Light and Air—Injunction—Damages.

V.-C. K.
1865
Sept. 27.
1866
May 5.

There is no distinction between the right to light and air in regard to town houses and country houses: *Clarke* v. *Clark* (1) discussed.

The Plaintiff having proved that about one-half of the sky area which had previously been open to him was shut out by the Defendant's new building; and that he had been obliged, owing to the diminution of light, to remove his workmen from where they had formerly worked to another portion of his premises:—

Held, entitled to relief. But as part of the Defendant's building had been erected, and as no mandatory injunction was prayed, an inquiry was directed as to the amount of damages sustained by the Plaintiff.

THE Plaintiff was possessed of a leasehold house, on the west side of *London Street, Paddington,* which was used by the Plaintiff for his business as a tailor, the ground floor being used as his shop and office, and the basement as a workshop.

The Defendant was possessed of, and occupied a house in *London Street,* and he was also possessed of a house at the back of this house, in *Conduit Place,* and separated from the Plaintiff's premises by a distance of eighteen feet. The Defendant's house in *Conduit Place* was, until the time of filing the bill, a low house of only three stories in height, and was much lower than his adjoining house in *London Street,* which was two stories higher; and was also much lower than the Plaintiff's house. The Plaintiff's house had a large window in the basement, looking nearly south into *Conduit Place,* and giving light to his workroom, which window was an ancient light. The Defendant had recently commenced raising his house in *Conduit Place,* and intended to build it up to the height of his adjoining house in *London Street,* being sixteen feet above its former level.

The bill charged that such erection would be a disturbance of the Plaintiff's right to the free access of light and air to his premises, and a very serious injury to the comfort and health of his family, and to his business; that the Plaintiff's workmen

(1) Law Rep. 1 Ch. 16.

V.-C. K. 1865-6 MARTIN v. HEADON.

required a good light for the purpose of such business, and if the Defendant was permitted to raise his house in the manner before mentioned, the workmen would be unable to see to do their work in the basement workroom, and the effect would be prejudicially to affect the value of his property, and prayed an injunction to restrain the Defendant from raising the height of his house in *Conduit Place* to a greater height than formerly, so as to interfere with, or prejudicially affect, the access of light and air to the Plaintiff's premises.

On the 14th of October, 1864, an interim order for an injunction was obtained, but the Defendant having, notwithstanding, proceeded with the building complained of, and having raised the wall thereof to the extent of seven feet, the Plaintiff moved, on the 12th of December, 1864, to commit the Defendant for breach of the injunction. The motion for the injunction came on at the same time, and the Vice-Chancellor, upon the Defendant undertaking to abide by any order the Court might make for pulling down the additions made by him since the interim injunction was granted, and for compensating the Plaintiff in damages, and also undertaking not to raise the wall in *Conduit Place* higher than it then was, directed that the motion for an injunction should stand over until the hearing.

The case now came on upon motion for a decree.

From the evidence in the cause on the part of the Plaintiff, it appeared that in consequence of the additional height of the Defendant's building, the room on the basement floor, facing *Conduit Place*, had been rendered useless as a workroom, and the Plaintiff had been compelled, at considerable expense, to convert his front kitchen in *London Street* into a workroom, and the workroom into a kitchen; that the Plaintiff's house was occupied from the year 1846 to 1853, by Mr. *Stone*, a tailor, who used the room in the basement floor as a workroom; that when the Defendant's premises in *London Street* and in *Conduit Place* were built, which was in the year 1851 or 1852, they so darkened his rooms that he was obliged to remove some of his men from the workshop in the basement to another room, and although there was space for at least six or seven men to work on the same board prior to the erection of the Defendant's premises, only three could see to work

after those premises were erected. That in consequence of the inconvenience occasioned to him by this cause, he removed altogether from the house in March, 1853.

It was also in evidence that the window of the Plaintiff's workshop had been altered and enlarged within twenty years prior to the filing of the Bill, but that the Plaintiff had since reduced the size of such window, and had restored it to its former dimensions.

The evidence on behalf of the Defendant went to deny that any serious amount of damage had been done by the new building, and that the diminution of light was too trivial to cause any inconvenience to the Plaintiff.

Mr. *Glasse*, Q.C., and Mr. *Cracknall*, for the Plaintiff:—

The Defendant has no right to abstract from the Plaintiff's premises any of the light which he has been in the habit of enjoying. Light is required for the ordinary business of life, but the Plaintiff requires a more than usual amount, from the nature of the business in which he is engaged.

In *Clarke* v. *Clark* (1) the Lord Chancellor said: "The question is, whether there has been such an interference with the light and air reaching the Plaintiff's house as to cause material annoyance to those who occupy it." The evidence in this case fully establishes the fact that the interference with the light and air reaching the Plaintiff's house causes him material annoyance, since he is unable to use his premises for the purpose he has been in the habit of using them. In *Herz* v. *The Union Bank of London* (2), the Plaintiffs were diamond merchants, and it was shewn that they required a considerable amount of light, and the abstraction of any portion of it would injure them in their business, and this was admitted as a ground for the interference of the Court. The principles which govern the Court have no doubt lately undergone considerable discussion, but there is no actual change in those principles. It is true that in *Clarke* v. *Clark* the Lord Chancellor made use of observations tending to unsettle the law. His Lordship appears to have said: "Persons who live

(1) Law Rep. 1 Ch. 16. (2) 2 Giff. 686.

V.-C. K. 1865-6 MARTIN v. HEADON.

in towns, and more especially in large cities, cannot expect to enjoy continually the same unobstructed volumes of light and air as fall to the lot of those who live in the country. The steady spread of buildings in and round large towns, gradually, but surely, obstructs some of the light and air which the houses in the interior of the place formerly enjoyed. And in estimating the damage, if any, occasioned to this Plaintiff, we must not omit the consideration that the place in which he complains of obstruction to light and air, is a large and populous city."

That case was followed, to a certain extent, by two cases subsequently decided by the Lords Justices, viz., *Durell* v. *Pritchard* (1), and *Robson* v. *Whittingham* (2), but in *Yates* v. *Jack* (3) the Lord Chancellor used expressions which certainly do not carry the principle to the extent which has been supposed, and the Vice-Chancellor *Wood*, in the case of *Dent* v. *Auction Mart Company* (4), evidently thought that the Lord Chancellor had at least modified, if not repudiated, the new principle said to have been laid down in *Clarke* v. *Clark*.

[They also cited *Cooper* v. *Hubbuck* (5); *Stokes* v. *The City Offices Company* (6); *Renshaw* v. *Bean* (7); *Tapling* v. *Jones* (8); *Pilgrim* v. *Pilgrim* (9).]

Mr. *Baily*, Q.C., and Mr. *Cottrell*, for the Defendant:—

All the authorities bring the question back to the quantum of damages occasioned. The injury inflicted in this case, if there really has been any, consists in detracting a very small portion of light from the window in the basement of the Plaintiff's house; and the question is, whether the Court will be induced to grant an injunction where the injury is so trivial. It is said that the journeymen tailors have been deprived of some portion of the light, and the consequence has been that the workroom is removed from the front of the house to the back. This probably involved the expense of moving the stove and the work-board, all of which might be compensated by about thirty shillings. It is

(1) Law Rep. 1 Ch. 244.
(2) Ibid. 442.
(3) Ibid. 295.
(4) Law Rep. 2 Eq. 238.
(5) 30 Beav. 160.
(6) 12 L. T. (N. S.) 602.
(7) 18 Q. B. 112.
(8) 13 W. R. 617.
(9) Unreported.

a case in which no jury would give more than £10 damages. There certainly has not been such an interference with the light and air reaching the Plaintiff's house as to cause any material inconvenience to the person who occupied it. In the case of *The Attorney-General* v. *Nichol* (1), Lord *Eldon* said that a diminution of the value of premises was not a ground for the interference of the Court by injunction, and the Court would not interpose upon every degree of darkening ancient lights and windows. There were many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained.

In *Jackson* v. *The Duke of Newcastle* (2), it was laid down that it was not in every case in which an action could be maintained for an obstruction of ancient lights that an injunction would be granted by a Court of equity. The injury to property must be so material as to render it unfit for the purpose to which it had been applied. If any injury has been done in this case, it is one for damages only, and not for an injunction.

Mr. *Glasse*, in reply.

May 4. SIR R. T. KINDERSLEY, V.C.:—

This bill is filed for an injunction to restrain the Defendant from obstructing the access of light and air to the windows of the Plaintiff's house.

Before I refer to the particulars of this case, I may observe that within the last twelve months several cases have come before the Court respecting the obstruction of the access of light and air to ancient windows. The first case to which I think it necessary to refer is *Clarke* v. *Clark*, decided by the Lord Chancellor in November last. In that case, his Lordship, in his judgment, used expressions calculated to produce, and which, in fact, did produce, the impression that he was of opinion that where the light and air coming to ancient windows in a house in any large town will be obstructed by buildings about to be erected, the owner of such ancient lights must, in order to entitle him to relief, make out a

(1) 16 Ves. 338. (2) 10 Jur. (N.S.) 688.

V.-C. K. 1866 MARTIN v. HEADON.

greater degree of damnification than he would be obliged to make out if his house had been situated in the country. It seems to have led to that conclusion; and in the two cases which followed, of *Durell* v. *Pritchard*, in December, 1865, and *Robson* v. *Whittingham*, in January, 1866, before the Lords Justices, their Lordships grounded their decisions on that view. In March, 1866, the case of *Yates* v. *Jack* was decided by the Lord Chancellor, and immediately afterwards the Vice-Chancellor *Wood* gave his judgment in *Dent* v. *The Auction Mart Company*. In the last-mentioned case the Vice-Chancellor carefully examined the four prior cases which I have mentioned, and the view which he took of them was, that *Clarke* v. *Clark* had first suggested the distinction between houses in a town and houses in the country; and that the two cases before the Lords Justices had proceeded on the supposition that the principle of such distinction had been established by *Clarke* v. *Clark;* but his Honour was of opinion that in *Yates* v. *Jack*, the Lord Chancellor, though not in express terms repudiating that principle, had used such language as amounted to a negation of it; and his Honour came to the conclusion, which I most readily adopt with him, that the apprehension as to the effect of the prior decisions has been removed, and that with respect to the right of the owner of ancient lights to be protected against any obstruction to the access of light and air to his windows, there is no distinction between houses in towns and houses in the country. In deciding the case now before the Court, I shall proceed on the same view as the Vice-Chancellor *Wood* adopted in *Dent* v. *The Auction Mart Company*.

I proceed, therefore, now to consider the merits of this case.

The window in the Plaintiff's house which is most materially affected by the Defendant's erection, is the window of the workshop on the basement floor, and my observations will have reference principally to that window. And, first, I shall consider how much of that quantity of light which came to that window before the Defendant's new erection, has been obstructed by that erection. The new building consists merely of the raising of an existing house, which was thirty-two feet high, to a height of forty-eight feet, thus making a difference of about sixteen feet in height. The width of that house was sixteen feet; so that the

frontage of the new erection towards *Conduit Place* may be considered as being a square of about sixteen feet. This new elevation does not directly face the workshop window, and a person looking out of that window in order to look directly at the new erection, must, instead of looking straight before him, turn his face to the right at an angle of about forty-five degrees, and must also look upwards at an angle of sixty-five degrees from the horizon. Following out the measurement given in the plan, where the ground plan and elevation are given on the same scale, I find that to a person looking out from the workshop window to the new elevation, having regard to the fact that it is not directly opposite to the workshop window, the quantum of sky area which the new elevation shuts out is about thirteen degrees measured horizontally, and eight or nine degrees measured vertically. That is in itself a very small portion of the total sky area visible to a person looking out at a vertical window, where there is no obstruction, which area is of course 180 degrees measured horizontally, and ninety degrees measured vertically. And if when the Defendant began his new erection the Plaintiff's workshop window derived the benefit of the total sky area without any obstruction whatever, the injury done to the Plaintiff by the Defendant's new erection would be hardly appreciable. But at the time when the Defendant commenced his new building, a very large portion of the sky area was already shut out from the Plaintiff's workshop window, by pre-existing buildings; and only a very limited portion of sky area remained available for that window. And the question is not what proportion of *the total sky area* does the Defendant's new erection shut out from the Plaintiff's window, but what proportion does it shut out of that part of the sky area which was not already shut out by existing buildings. It is necessary therefore to ascertain how much of the whole sky area was already shut out by pre-existing buildings.

In this case it is easy enough, from the plan before mentioned, to ascertain this. The Defendant's larger house, which has its principal front towards *London Street*, and the north side of which, towards *Conduit Place*, is immediately opposite to the window in question, shuts out from that window a space of not less than seventy degrees measured horizontally, by seventy degrees measured vertically.

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In addition to that, the Defendant's other house fronting towards *Conduit Place*, without the new erection, shuts out from that window a further space of sky area of about thirty degrees measured horizontally, by rather more than sixty degrees measured vertically. So that the portion of sky area which, before the commencement of the Defendant's new erection, was already shut out from the Plaintiff's workshop window by those two houses, was not less than 100 degrees measured horizontally, and more than sixty-five degrees on an average, measured vertically. I might add, that a further portion of sky area was also shut out by some other buildings in *Conduit Place*, adjoining to the Defendant's last mentioned house on the west side thereof, and of about the same height as that house; but that portion is very small when compared with the very large portion which was shut out by the Defendant's two houses, and I do not think it necessary to take it specifically into account. I am, however, satisfied that full three-fifths of the total sky area was already shut out from the Plaintiff's workshop window by pre-existing buildings.

But further, the portion of sky area thus already shut out comprised that part of the sky area which would, if unobstructed, send the most light through the window into the workshop. It is obvious that, if a room is lighted by a vertical window facing the south, or nearly south, the part of the sky area which sends the most light into the room through that window is the part which faces the window; and, moreover, that the lower half of that part of the sky area, that is to say, the space of forty-five degrees from the horizon, gives much more light into the room than the upper half towards the zenith. Now the whole of this part of the sky area was already shut out from the workshop window by the pre-existing buildings. And the portion of sky area from which, immediately before the commencement of the Defendant's new building, the Plaintiff's workshop derived the largest quantity of light, was that portion which was visible from the workshop window over the Defendant's smaller house, being that very portion which has now been shut out by the Defendant's new erection.

I now advert to the evidence of witnesses as to the effect of the Defendant's new erection. As is usual in these cases, what may be called the scientific evidence is very contradictory, but I think

it unnecessary to go into it, because it deals only with matter of opinion, and we have the more satisfactory evidence of matter of fact. The Plaintiff proves that after the front wall of the Defendant's new erection was set up, he was obliged, owing to the diminution of light thereby occasioned, to remove his workmen (who used to work close to the window of the workshop in question) to another room; and this evidence is fully corroborated by that of the foreman and three of the Plaintiff's workmen. If that be the fact, it appears to me conclusive on the subject. It has, indeed, been suggested that the removal of the workmen was altogether unnecessary, and that it was adopted in order to make it appear that serious injury had been done to the Plaintiff by the new erection; but I do not think there is any sufficient foundation for that suggestion. It was further insisted, on the part of the Defendant, that the necessity for the removal of the Plaintiff's workmen (if it was necessary) was occasioned by the circumstance that the Defendant had diminished the size of the window of the workshop. Now it is quite true that the Defendant had reduced the dimensions of the window, his reason for so doing being, that as he had some years before increased its size, he was advised that he could not, according to the doctrine of *Renshaw* v. *Bean*, maintain this suit unless he restored the window to its original state. This he accordingly did, though it was unnecessary to do so, because *Renshaw* v. *Bean* has been overruled. But the evidence shews that the reduction of the size of the window could not have occasioned the necessity for the removal of the workmen, inasmuch as it took place some time after the removal.

Upon the whole, then, it appears to me that the Defendant's new building has caused a considerable and serious abstraction of light from the Plaintiff's workshop, and has thereby occasioned a serious impediment to the carrying on of the Plaintiff's business as it had previously been carried on. According to the opinion of the Lord Chancellor in *Yates* v. *Jack*; and of the Vice-Chancellor *Wood* in *Dent* v. *The Auction Mart Company*, it is no answer to the Plaintiff's case to tell him that it is still possible for him to carry on his business, for that many persons carry on the business of a tailor with a less quantity of light than that which still remains available for the Plaintiff's workshop. The Defendant

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has no right to deprive him of any quantity of light, the loss of which will prevent his carrying on his business with the same facility and convenience as heretofore. As a matter of principle, it appears to me that the easement of light, that is, the right which a man has to receive into his ancient window a certain supply of light over or across another man's land, is just as much part of his property as his land or his house, and is just as much entitled to protection as any other property. It may be, indeed, that the damage done by the neighbour's act may be so trivial as not to justify the interference of the Court. But wherever it is shown that the comfort or enjoyment of a man or his family in the occupation of his house is seriously interfered with, and still more where he is prevented from carrying on his business with the same degree of convenience and advantage as theretofore, by reason of the abstraction of light caused by his neighbour's new buildings, there is sufficient ground for the interference of this Court. And it appears to me that in this case there is that degree of diminution of light, and interference with the advantageous carrying on of the Plaintiff's business, which justifies the Court in giving relief. A mandatory injunction not being asked, there must be an inquiry as to the amount of damage sustained by the Plaintiff.

Solicitor for the Plaintiff: Mr. *Henry White.*
Solicitors for the Defendant: Messrs. *Lee, Pemberton & Reeves.*

In re PENINSULAR, WEST INDIAN, AND SOUTHERN BANK.

V.-C. W.
1866
July 2.

AUSTIN'S CASE.

Winding-up—Contributory—Acceptance of Shares—Companies Act, 1862.

A. on being invited to become a director of a banking company about to be established gave a verbal assent, provided he should be satisfied that a certain proportion of the capital had been subscribed, and that certain persons named in the prospectus as directors would actually join the board.

He attended one board meeting, and so far took part in the business as on that occasion to sign a cheque together with one of the directors. On receiving, a few days afterwards, a letter of allotment of the shares necessary to qualify him, he at once returned it, declining at the same time to act as director, as he was not satisfied upon the two points stipulated for by him. The secretary wrote back, stating that *A.*'s "resignation" had been accepted. *A.* had nothing more to do with the bank:—

Held, that he was not liable as a contributory.

APPLICATION, by summons adjourned from Chambers, on behalf of Mr. *William Austin*, that his name might be struck off the list of contributories of the *Peninsular, West Indian, and Southern Bank*, now in course of being wound up.

In July, 1864, *Austin* was invited by Sir *Edwin Pearson* to join the direction of this bank, which was then about to be brought out as a limited company under the Act of 1862, and a prospectus (marked "preliminary and private," and in which his own name appeared as a director), was at the same time shewn him. *Austin*, in conversation with Sir *Edwin*, agreed to become a director, on being satisfied that more than one million of the capital was (as stated by Sir *Edwin*) already subscribed, and that the gentlemen named would join the board. Sir *Edwin Pearson* not being able to give Mr. *Austin* a definite answer upon these points, Mr. *Austin*, on meeting him shortly afterwards at *Eastbourne*, stated that he should not join the board or apply for shares until satisfied on this subject. On the 12th of September, 1864, with the view of ascertaining the correctness of the statements contained in the prospectus, *Austin* attended a board meeting, which, as he stated in his affidavit,

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"it is customary for persons about to become directors to do," and so far took part in the business as to sign a cheque for £500 together with one of the directors. Within a few days he received from the secretary a letter of allotment for ten shares (his qualification as one of the first directors.) *Austin* who had given up all notion of having anything to do with the company, at once (September 16), wrote back as follows :—

"I beg to return you the letter of allotment which I have just received. I am sorry that it will not be in my power to act as a director of the bank. When Sir *Edwin Pearson* mentioned the matter to me, I understood that ten thousand shares were actually subscribed. I now find that a considerable number are engaged to be subscribed by a company which has not yet allotted its own shares, and that it is not likely that the bank will get the full benefit of the capital arising from such subscriptions. I also miss some influential names from the prospectus which was given me for inspection. I may add that I was never summoned to any meeting of the directors. Under these circumstances, and with much regret, I have come to the conclusion that it will not be in my power to co-operate with you and the gentlemen forming the board. You will please submit this letter to the directors."

To this letter the secretary replied, on the 19th September, 1864, that Mr. *Austin's* letter had been laid before the board, "and I am desired to inform you that your resignation has been accepted by the directors," with regret. *Austin* never had anything further to do with the bank, never received any application for payment of deposit or allotment money, and was not aware that his name had been inserted in the register of shareholders until October, 1865, when he was threatened with proceedings by a shareholder to recover the money paid on the faith of the representations contained in the prospectus to which *Austin's* name was attached as a director. *Austin* replied that he had never acted as a director and never authorized his name being published in the prospectus.

Mr. *Austin's* name having been included by the official liquidator in the list of contributories under the winding-up of this

company, a summons had been taken out in Chambers to strike off his name, and was now adjourned into Court.

The provisions of the memorandum of association relating to the qualification, appointment, and resignation of the directors, were as follows:—

"78. No person not being one of the first directors to be named and appointed pursuant to clause 71 of these presents, or a director elected by the board prior to the first ordinary meeting, pursuant to the provisions herein contained, shall be eligible to the office of director, unless he be the holder of at least twenty shares, and shall have held the shares at least one month preceding the day of election, nor unless he shall have given notice in writing at the office of the company in *London*, at least twenty-one days and not more than one month, of willingness to be elected: Provided always, that any director retiring by rotation shall be deemed willing and eligible to be re-elected without such notice, unless he shall have given to the company notice in writing of a contrary intention at least twenty-one days before the day of election.

"83. The office of every director shall be vacated:—

"If he accepts or holds any other office under the company except that of managing director.

"If he become bankrupt or insolvent, or compounds with his creditors.

"If he is declared lunatic, or becomes of unsound mind.

"If he is absent from the board for more than four consecutive months without the consent of the board, unless he shall be a director residing abroad, in which case one attendance annually shall be considered sufficient, or unless by consent of the board non-attendance shall not be taken to disqualify.

"If he ceases to hold the required number of shares to qualify him for the office."

Mr. *G. M. Giffard*, Q.C., and Mr. *Dickinson*, in support of the application, contended that Mr. *Austin* was not liable as a contributory, as he had neither applied for shares nor consented to become a director. Sir *Edwin Pearson* offered to place him upon the board, and his answer was, that he would join—not unconditionally, but provided he was satisfied that a certain number of shares had been

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subscribed and certain gentlemen would act as directors. He was not satisfied, and gave up all idea of joining the company. He could not be said to have resigned, as there was nothing in the shape of an acceptance, and without either an application for shares or an acceptance of shares when offered to him, the mere act of signing a cheque could not constitute him a shareholder. They cited *The Marquis of Abercorn's Case, Re The National Assurance and Investment Association* (1).

Mr. *Cottrell*, on behalf of the official liquidator, contended that in order to become a shareholder it was not necessary to assent in writing, or even to apply for shares in writing, and that Mr. *Austin*, by allowing his name to remain on the prospectus, and by taking part as a director in the business at the meeting of the 12th of September 1864, had held himself out to the world as a director and could not now escape from liability.

SIR W. PAGE WOOD, V.C.:—

The case is very doubtful, but on the whole I think this gentleman's name must be removed from the list of contributories. The strange part of the case is, that he went on the 12th of September to a meeting of the company, where he took the very strong step of signing a cheque, but then, on the other hand, when the letter of allotment was sent to him, he at once returned it, rejecting both the shares and the office of director. I think it must be taken that the whole matter was not finally concluded, and his name must be struck off the list of contributories and removed from the register of members, but no costs will be given to him.

13 Eq. 34

Solicitors: Messrs. *Combe & Wainwright*; Mr. *Brandon*.

(1) 10 W. R. 548.

SURR *v.* WALMSLEY.

V.-C. W.
1866
June 19.

Practice—Evidence—Examiner, Proceedings before—15 & 16 *Vict. c.* 86, *s.* 32.

In an examination taken *ex parte*, the examiner ought not to refuse to allow questions to be put, unless upon matters which would clearly and palpably not be evidence.

THIS was a motion that the examiner might be directed to take the examination of *William Walmsley*, and to take down such answers as *Walmsley* might give to the questions submitted to him, or his objections thereto, as provided by 15 & 16 Vict. c. 86, s. 32.

The bill was filed by a creditor of the firm of *Walmsley, Brothers*, which had succeeded a former firm and had since become bankrupt, against the surviving partner (*James Walmsley*) of the old firm, who had retired in April, 1864, before the bankruptcy of the present firm, for the purpose of compelling the Defendant to make good the deficiency between the full amount of the Plaintiff's debt, and the dividend coming to him under the estate of the bankrupt partners. Issue was joined.

The case was, shortly, that the Defendant, upon his retiring from the firm, had induced the Plaintiff to continue to the new firm the credit which he had given to the old firm, and that he had done so by making an untrue statement as to the position of the firm, and their assets and liabilities. *William Walmsley*, a nephew of the Defendant, and employed by him and his deceased brother and partner *John*, during their partnership, in the warehouse and counting-house, was called to give evidence (having refused to make an affidavit) as to the preparation of a stock account framed for the purpose of representing the partnership to be in a flourishing condition, at a time when (as alleged by the bill) it was really insolvent.

In the examination *ex parte*, before the examiner, the witness was asked what instructions *John Walmsley*, the deceased brother of the Defendant, had given him.

The examiner observing that he was bound to see that none but

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legal evidence was admitted, declined to allow any questions to be put to witness, as to what instructions were given, or what was said by *John* to witness, in the absence of the Defendant *James*.

Mr. *De Gex*, Q.C., and Mr. *Roxburgh*, for the motion, contended that the examiner was not entitled to shut out the particular questions. An examination taken *ex parte* was in the same position as, and was to be deemed to be an affidavit, *General Orders* February 5, 1861, rule vi., which might contain some statements which were not strictly evidence, but would not on that ground be rejected entirely. If the witness had consented to make an affidavit, these statements could not have been kept out.

[The VICE-CHANCELLOR:—I have often thought it a great abuse that solicitors should put into affidavits matters which they must know are not evidence. Ought not the examiner, who is an officer of the Court, to exercise some discretion?]

This evidence is not mere hearsay, but part of the *res gestæ*. But if it were necessary to prove that every question put to a witness examined *ex parte* would produce an answer that should be strictly evidence, it would be utterly impossible for counsel to conduct an examination. Credit must be given to them, as is done at *nisi prius*, that they will not pursue an improper line of examination. Let the deposition be taken, and then the Court at the hearing will have an opportunity of considering what, if any, portions of it should be rejected as not being evidence.

SIR W. PAGE WOOD, V.C.:—

It is to be regretted that this evidence was excluded, although I cannot take upon myself to say that the examiner would not be justified in excluding that which is clearly and palpably no evidence, yet it is possible that under the peculiar circumstances of this case these questions might be proper; the object of the Plaintiff being to shew that the stock account prepared by the witness was erroneous, and for that purpose to extract from him on what principle it was made out. But any question as to what,

in *James's* absence, *John* said that *James* had said, could not by any possibility be evidence, and must be excluded. V.-C. W. 1866 SURR v. WALMSLEY.

There must be a direction to the examiner that the examination of the witness do proceed, and that the questions objected to be answered.

Solicitors: Messrs. *Sole, Turner, & Turner.*

SABLICICH *v.* RUSSELL.

V.-C. W. 1866 *June* 28, 29.

Interpleader—Proceedings against a Ship in the Court of Admiralty—Bill filed by Master—Acknowledgment of Title.

Where a suit has been instituted in the Court of Admiralty by arrest of a ship, on behalf of a person claiming to be the owner of goods, on the ground of breach of duty on the part of the master in not delivering the goods to him; and a like proceeding has been instituted in the same Court by another claimant in respect of the same goods:—

Semble, a bill of interpleader by the captain of the ship will not lie, on the grounds—1, That the proceedings are not against him, but against the ship; and 2, That the Court of Admiralty has jurisdiction to decide the whole question.

What acts on the part of a master of a ship will amount to a sufficient acknowledgment of title on his part to deprive him of the right to file a bill for interpleader against two persons, both claiming to be owners of the same goods, part of the ship's cargo—discussed.

THIS was a bill for interpleader.

The Plaintiff, *Giovanni Sablicich*, describing himself as of *Bristol*, was the master of an Austrian ship, the *Argentina*, which sailed from *New York* in January last, and arrived at *Bristol* on the 24th of March, with a cargo comprising a lot of 270 barrels of oil-cake, shipped by *John Gilbert* at *New York*. Before starting, the Plaintiff had signed three bills of lading for the lot, whereby the goods were deliverable to order at *Bristol*.

On the day of the ship's arrival one of the bills of lading was presented by the agent of a firm of Messrs. *Turner & Co.*, and delivery was demanded. Immediately after this, as the bill alleged, the Plaintiff was served by the Defendant, *William Russell*, with a notice stating that he was the indorsee and holder of the

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bill of lading of the goods, and that the Plaintiff was not to deliver the goods except to him (*Russell*) or his order; and on Monday, the 26th of March, *Russell* went on board with one of the bills of lading, and demanded the goods.

Messrs. *Turner & Co.*, finding there was a dispute, returned the bill of lading which they held to the person from whom they got it, who was the other Defendant, *John Gilbert*, of *Bristol*, who thereupon claimed the goods.

The bill then alleged that in delivering out some other goods to the Defendant *Gilbert*, the mate of the ship by a mistake as to the marks, let him have forty barrels of this lot of oil-cake, and that the Defendant *Russell* had, without the Plaintiff's permission, taken nine more barrels, leaving only 221 under the Plaintiff's control. The Plaintiff had given to each of the Defendants notice that he was ready to warehouse the goods, in order to have the Defendants' rights determined.

The Defendant *Gilbert* had arrested the ship in the Court of Admiralty in respect of his claim, and it was alleged that each of the Defendants threatened and intended to institute further proceedings against the Plaintiff for the recovery of the 221 barrels, and had given notice to the Plaintiff of his claim.

The Plaintiff submitted that the Defendants ought to interplead, and prayed accordingly; and that in the meantime the Defendants might be restrained from continuing or commencing (except under the direction of the Court) any proceedings in the Court of Admiralty, or in any other Court, in respect of the goods.

The Defendant *Gilbert's* case was, that on the 7th of February he received from his son, *John Gilbert*, of *New York*, a letter enclosing the bills of lading signed by the Plaintiff, and indorsed in blank by *John Gilbert*, junior, also a bill for the price of the goods, drawn upon *Frederick Stone*, of *Bristol*, and a copy of a letter from *John Gilbert* to *Stone*, in which *John Gilbert* mentioned having shipped the goods to *Stone*. Soon afterwards *Stone* pressed the Defendant *Gilbert* to let him have one of the bills of lading, which the Defendant refused, except for cash payment, whereupon *Stone*, on a subsequent day in February, came to the Defendant, and promised to bring him cash the same day, and asked him in the meantime to take a bill drawn by him (*Stone*) upon one *John Stiles* as a

security. To this the Defendant consented, and handed *Stone* a duplicate of the bill of lading, but without indorsing it to him or any one. *Stone* failed to bring the cash; and in about a fortnight afterwards, before the arrival of the ship, he stopped payment, and afterwards executed a trust deed. *Stiles* had also become bankrupt.

After this, and before the arrival of the vessel, the Defendant *Gilbert* delivered another bill of lading for these goods to *Turner & Co.*, and *Turner & Co.*, after the arrival of the ship, presented it to the Plaintiff, *who signed it with his initials* on the back. This bill of lading was afterwards returned. The Defendant *Gilbert* duly entered the goods and paid the proper dues and charges. He said that from time to time he had forty barrels out of the 270, but failed to obtain the rest.

After giving the Plaintiff notice, and making repeated applications, on the 4th of April he commenced a suit in the Court of Admiralty, by arresting the ship under the 6th section of the *Admiralty Court Jurisdiction Act*, 1861, on the ground of the alleged breach of duty, or breach of contract on the part of the master. Bail was put in in the action, and on the 24th of April the vessel was released from arrest.

The Defendant *Gilbert* deposed that he had never taken, or directly or indirectly threatened to take, any proceedings personally against the Plaintiff.

The Defendant *Russell's* case was, that on the 16th of February, *Stone* offered him, in the regular way of business, 270 barrels of oil-cake, expected to arrive by the *Argentina*, shewing him the bill of lading, which was then indorsed in blank by *John Gilbert* the younger. Defendant agreed to purchase the goods, and *Stone* having stated that the amount would be about £250, Defendant gave him his acceptance for that sum. *Stone* thereupon endorsed the bill of lading as follows: "Deliver to the order of Mr. *Wm. Russell.* *Frederick Stone;*" and also sent an invoice of the goods, amounting to £240 18*s.* 6*d.* The acceptance had been honoured, and the bill of lading had ever since remained in the Defendant's possession.

After the arrival of the ship, various negotiations took place between the Defendant *Russell* and his solicitors, and the ship's

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agent at *Bristol,* in reference to the delivery of the goods, and on the 27th of March, Defendant's solicitors threatened proceedings unless consent were given to the delivery that day. At the agent's request, further time was given, and on the 29th March, as the Defendant stated, the agent came to his office, and said, that the Plaintiff would deliver to him. Defendant thereupon sent his waggon, and the ship's agent directed the nine barrels to be put into the waggon, which was done, and the mate requested Defendant's son to sign, and he did sign, a receipt in the ship's delivery book for the same. Defendant said, he took the barrels with the consent of the Plaintiff, through his agent.

On the 31st of March the Defendant *Russell* first heard that the Defendant *Gilbert* had taken away some of the casks, and he claimed damages from *Gilbert* accordingly.

Upon this subject of the Plaintiff's consent to the removal of the goods there was a conflict of evidence. The ship's agent, on behalf of the Plaintiff, denied all the specific circumstances attending the delivery of the goods which the Defendant *Russell* had asserted, declaring that his orders to the mate were never to deliver to either of the Defendants.

The bill was filed on the 26th of April, and on the 16th of May the Defendant *Gilbert* became bankrupt.

It was admitted that the Defendant *Russell* had also attached the ship.

Mr. *C. Hall,* for the Plaintiff:—

The principle on which this relief is sought is laid down by Dr. *Lushington* in the case of *The Tigress* (1), who says, speaking of a case of this kind: "The refusal of the master to deliver upon demand is, in cases like the present, sufficient evidence of conversion. The master may, indeed, sometimes suffer for an innocent mistake; but he can always protect himself from liability by filing a bill of interpleader in Chancery" (2).

Mr. *Rolt,* Q.C., and Mr. *E. K. Karslake,* for the Defendant *Gilbert*:—

This is not a subject-matter for interpleader. No proceedings

(1) 32 L. J. (P. M. & A.) 97. (2) Ibid. 102.

have been taken against the Plaintiff personally. The proceedings in the Court of Admiralty are proceedings *in rem*, not *in personam*, that is to say, against the ship, not against the master of the ship, who is only a servant. The principle is clear, that the holder of a bill of lading cannot be restrained from suing the ship, on the ground that the captain has been guilty of a breach of duty personally, and that he, therefore, and not the ship is liable (1).

Upon the second branch of the case, the evidence shews, 1, that the Plaintiff has acknowledged the right of the Defendant *Gilbert*, by allowing part of the goods to be delivered to him: *Crawshay* v. *Thornton* (2); and, 2, that the captain, by the conduct either of himself or of his agent, the mate, has embarrassed the true owner in the recovery of his property. On either of these grounds the right of interpleader is at an end.

Mr. *Dickinson*, for the Defendant *Russell*:—

The principles of interpleader do not apply.

In the first place, this suit will not put an end to the contest, part of the goods having been delivered up to the Defendant *Russell*, as we say, with the consent of the ship-broker, whose servant the Plaintiff is: *Braine* v. *Hunt* (3).

The evidence about the message to *Russell*, that if he sent his waggon he should have the goods, was quite as strong an admission of title as the admission in *Crawshay* v. *Thornton* (4).

Lastly, delay alone is sufficient to disentitle the Plaintiff to relief. The ship arrived on the 24th of March, and the bill was not filed till the 26th of April, more than a month. This degree of delay has been held fatal: *Tufton* v. *Harding* (5).

Mr. *Hall*, in reply:—

At least, it must be admitted, here is a double claim; and where two persons claim the same thing by different titles, and another person is in danger of injury from ignorance of the real title to the subject in dispute, the Court will protect him (6).

Crawshay v. *Thornton* is no difficulty in the way of this case.

(1) Story, Eq. Pleadings, 194–197.
(2) 2 My. & Cr. 1, 19.
(3) 2 C. & M. 418.
(4) 2 My. & Cr. 1, 3.
(5) 8 W. R. 122.
(6) Mitf. Pl. 5th ed. 164.

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The Plaintiffs there had, in fact, made a title against themselves, and the case could not be brought on as one between two claimants.

It has been said that this is a proceeding *in rem*, but to such a proceeding as this the master must always be a party. It is alleged misconduct or breach of duty on the part of the master which is the ground of the proceeding under the 6th section of the *Admiralty Court Act*, 1861 (24 Vict. c. 10).

The VICE-CHANCELLOR:—There is at least a question whether you have not acknowledged the title of *Gilbert*.

Mr. *Hall*:—That is a question which cannot be tried in the Admiralty Court. We say the goods were taken without our permission.

SIR W. PAGE WOOD, V.-C.:—

As far as the proceedings in the Court of Admiralty have already gone, I do not see that they are proceedings directed against the Plaintiff, the master of the ship, for any alleged default on his part. Hitherto they appear to have been proceedings against the ship; that is to say, they are proceedings in which the loss will fall upon the owners of the ship, if the persons who are suing in the Court of Admiralty should succeed. The real Defendants are, of course, the owners of the ship; but the proceedings are said to be against the ship, that is to say, the ship is to be made liable for the alleged default. That being so, a bill of interpleader by the master of the ship would not be a bill to relieve himself, but a bill to relieve the owners of the ship, at his suggestion.

Further than that, it appears that the Defendant, *Russell*, has been advised to proceed against the vessel. It would seem, therefore, that his claim will be tried in the Court of Admiralty, and very advantageously tried; and inasmuch as two persons cannot succeed against the ship in respect of the same subject-matter, it may be supposed that the Court of Admiralty will do complete justice between the parties.

But then, Mr. *Hall* very truly says, "Although proceedings, hitherto, have been only against the ship, these Defendants *may*

take proceedings against me; and both their claims are in respect of the same subject-matter. If one of them undertakes to do nothing against me, still I want to be protected against the other."

The difficulty is, whether such a case as this is to be considered one of pure interpleader. I can understand a case arising where, without any default on the part of the captain—a shipwreck for example—half of a certain quantity of goods might be lost, and the captain might be able only to deliver the other half, in which case he might say:—"I desire to be protected by interpleader with respect to this one half." But here there cannot be said to be a clear and simple case like that of accidental loss. The Plaintiff has allowed one claimant to have forty casks of these goods, and the other to have nine; and it is open to either of them to say, "You have acknowledged my title." The Defendant *Russell*, even supposing his own case not made out, might say, "At all events you have handed over those forty casks to *Gilbert*, and although, according to your statement, you did it in consequence of there having been some confusion as to the marks on the goods—that was your business and you ought not to have mistaken your marks—you are still liable for damages." I very much doubt whether, in such a state of things as this, a question of interpleader arises.

But there is another difficulty, and that is, whether the Plaintiff has not acknowledged the title of one person to whom a bill of lading was delivered, by signing it with his initials. Then, on the other hand, the Defendant *Russell* sent his waggon for the goods, and got them.

On the whole, I think this is not a case of interpleader, and I must refuse the motion with costs.

Solicitors for the Plaintiff: Messrs. *Williamson, Hill, & Co.*

Solicitors for the Defendants: Messrs. *Pritchard & Englefield;* Messrs. *Fielder & Sumner.*

V.-C. W.

1866

June 1.

BARNES *v.* JENNINGS.

Voluntary Settlement—Gift to Persons by name, with Substituted Gift in the event of Death in the Lifetime of the Settlor—Death of Donee before the Settlement.

6 Jur. N.S. 472
4 Jur. 475

By a voluntary deed a settlor gave property to *A.*, *B.*, *C.*, and *D.*, in equal shares. He provided that if any of the four *should die* in his lifetime leaving specified issue, the share of him or her so dying should be in trust for the children of him and her so dying; and that if any of the four *should die* in his lifetime, without leaving such issue, the share of him or her so dying should go over and accrue and be added to the other shares. *A.* and *B.* were dead at the date of the settlement, the former leaving issue, the latter without issue:—

Held, that the gifts over of the shares of *A.* and *B.* did not fail by reason of their being dead at the date of the settlement.

JAMES WOOKEY, by a settlement dated the 18th day of April, 1862, in consideration of natural love and affection for his relations thereinafter named, covenanted to assign to three trustees certain shares and sums of stock specifically described, and all other the personal property of or to which he was then possessed or entitled, upon trust to sell and dispose thereof, and pay the income unto, or permit the same to be received by, himself the said *James Wookey*, and his assigns, during his life; and after his death, within such reasonable time as in their absolute discretion should seem advisable, to sell and convert, and out of the moneys in the first instance deduct and pay costs and charges; and in the next place, pay certain sums of cash to the persons therein named, if they should be then living. And as to two-thirds thereof, to divide the same into four equal parts, and pay and divide one of such fourth parts unto and amongst the four children of *William Wookey*, the late brother of the settlor, namely, *James Wookey* the younger, *William Wookey* the younger, *Caroline* the wife of — *Aston*, and *Charles Wookey*, in equal shares. "Provided always, that if any of the said four children of the said *William Wookey* should die *in the lifetime of the said James Wookey, the settlor, leaving issue*, the trustees should stand possessed of the share of him or her so dying, in trust for all or any the children or child of him or her, who being sons or a son

shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry under that age, and if more than one, in equal shares: provided always, that if any of the children of the said *William Wookey* should die *in the lifetime of the said James Wookey, the settlor, without leaving issue,* who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry, then the share of him or her so dying shall go over and accrue, and be added to the other shares or share aforesaid, and if more than one, then an equal proportion thereof to be added to each such share respectively." Trusts were declared of a second fourth which are immaterial; and as to the third fourth, the trustees were directed to pay the same unto *Mary Andrews,* widow, a sister of the settlor, and *if the said Mary Andrews should die in the lifetime of the settlor, leaving issue,* the trustees were directed to stand possessed of such one-fourth part, and the interest thereof, "in trust for all or any the children or child of the said *Mary Andrews* who being sons or a son shall attain the age of twenty-one years, or who being daughters or a daughter shall attain that age or marry under that age, and if more than one in equal shares: provided always, that if there be no issue of the said *Mary Andrews* who being males or a male shall attain the age of twenty-one years, or who being females or a female shall attain that age or marry, then the share of the said *Mary Andrews* shall go over, and come and be added to the shares of such of the sisters of the said *James Wookey* party hereto, herein mentioned, as may then be living, and of such children of the said *William Wookey* deceased, or their issue, as may be entitled under the trusts hereinbefore declared of and concerning the first one-fourth share, and in the same proportions."

James Wookey died on the 23rd of January, 1863. *William Wookey* the younger, *Charles Wookey,* and *Mary Andrews,* were dead at the date of the settlement. *William Wookey* the younger, and *Mary Andrews,* each left several children. *Charles* died unmarried. *James Wookey* the younger, and *Caroline Aston,* were still living, and had attained twenty-one.

The suit was instituted by two of the trustees against the third, to have the trusts of the settlement and will administered under the direction of the Court, and the question now argued was as to

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the destination of the shares to which *William Wookey* the younger, *Charles Wookey*, and *Mary Andrews*, would have been entitled if they had been living at the date of the settlement.

Mr. *Daniel*, Q.C., and Mr. *Little*, for the Plaintiffs, submitted the point to the Court.

Mr. *Rolt*, Q.C., and Mr. *G. T. Edwards*, for the Defendant *Jennings*, who was interested under the settlor's will:—

The gifts fail, by reason of the death of the first takers before the date of the settlement, and pass under the residuary devise in the will to the surviving objects of the gift: *Christopherson* v. *Naylor* (1); *Tytherleigh* v. *Harbin* (2).

Mr. *W. F. Robinson*, for *James Wookey* and the children of *William Wookey* the younger:—

The limitations over on the death of *William* leaving issue, and on the death of *Charles* without leaving issue, take effect notwithstanding that *William* and *Charles* were dead at the date of the settlement; the share of *William* passes to his children, and the share of *Charles* passes in thirds to *James*, the children of *William*, and Mrs. *Aston*.

Words of futurity, such as "should die," will include a past event; *Hewet* v. *Ireland* (3); *Manning* v. *Chambers* (4); *In re Sheppard's Trust* (5).

Mr. *Stallard*, for Mr. and Mrs. *Aston*, claiming a third of the share of *Charles Wookey*, supported the same construction, and cited *Seymour* v. *Lucas* (6); *White* v. *Chitty* (7.)

Mr. *Vaughan Johnson*, for the children of *Mary Andrews*:—

Notwithstanding the use of words sounding in the future, expressions relating to death in the lifetime of the settlor will apply to the case of death before the date of the settlement; *Wilkinson* v. *Adam* (8); *Ive* v. *King* (9).

(1) 1 Mer. 320.
(2) 6 Sim. 329.
(3) 1 P. Wms. 426.
(4) 1 De G. & Sm. 282.
(5) 1 K. & J. 269.
(6) 1 Dr. & Sm. 177.
(7) Law Rep. 1 Eq. 372.
(8) 1 V. & B. 422.
(9) 16 Beav. 46.

It is otherwise if the *class* of objects is to be determined at the death of the testator, as in *Christopherson* v. *Naylor* (1).

In wills, the intention of the testator has been held to prevail, by necessary implication, though he has failed to specify the actual event which has happened; *Jones* v. *Westcomb* (2); and the other cases and authorities reviewed in *Warren* v. *Rudall* (3).

Mr. *Rolt*, in reply.

SIR W. PAGE WOOD, V.C.:—

This case is much less strong than *Hewet* v. *Ireland* (4), and *Manning* v. *Chambers* (5). In *Hewet* v. *Ireland*, there was an intention on the part of a settlor to provide for all his daughters, by a voluntary settlement executed after marriage; and the remarkable feature in the case was the use of the words of futurity—"such daughter or daughters as *shall be* begotten"—there having been one daughter born before the date of the settlement. It happened that none were born afterwards, and the intention of the settlor in favour of his only daughter was held to prevail. That was a stronger case than the one before me.

So in *Manning* v. *Chambers*, the gift was open to this difficulty. The settlor seemed to say, "I intend to deprive the donee of the benefit of this limitation provided he becomes bankrupt *hereafter*; I pass over and condone his present bankruptcy." But the Court held that there was no reasonable doubt on the construction of the instrument, and that the limitation over took effect, the donee being an uncertificated bankrupt at the date of the settlement, although the words were clearly future.

The case before me much more resembles that of *In re Sheppard's Trust* (6), in which, following the observations of Lord *Hardwicke* in *Avelyn* v. *Ward* (7), I arrived at the principle, that wherever there is a conditional limitation over of an estate, defeating an absolute estate given prior to the limitation, if the precedent limitation by any means whatever is out of the way, the subsequent

(1) 1 Mer. 320.
(2) Prec. Ch. 316; S. C. 1 Eq. C. Abr. 245, pl. 10.
(3) 4 K. & J. 603—614.
(4) 1 P. Wms. 426.
(5) 1 De G. & Sm. 282.
(6) 1 K. & J. 269.
(7) 1 Ves. Sen. 420.

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limitation takes effect. Here the intention was to settle a gift upon a person whom the settlor conceived to be alive. We may assume that, from the words of futurity which are used. He reserves a life estate to himself, and then limits an estate to *A. B.*, conceiving him to be alive, in remainder. But he defeats *A. B.'s* estate in remainder "if he should die" either with or without issue in the settlor's lifetime.

The case of *Scatterwood* v. *Edge* (1) is much stronger than that before me. That was a case where real estate was devised in remainder to the first and other sons of *B.* successively in tail male, provided they should take the testator's surname; and in case they or their heirs should refuse to take the testator's surname, or die without issue, there was a gift to the first son of *C. B.* died without having had a son; consequently there was no one who could either take or refuse to take the testator's surname; and the Court held that the subsequent limitations to the first son of *C.*, who was then *in esse* and capable, took effect.

Here the settlor has limited an estate to a person with the intention that, in the event of his being out of the way at the settlor's death, the estate should go over. The person happened to be out of the way, by reason of his not being in existence when the settlement was executed.

I think, therefore, the case is clearly within that class of authorities which has been referred to, and that the gifts to *William Wookey* the younger and *Mary Andrews* went to their children, and the gift to *Charles Wookey* passed to the other objects of the gift.

The declarations will be framed accordingly.

Solicitors for the Plaintiffs, and some parties under the decree: Messrs. *Reed & Phelps.*

Solicitors for the Defendant: Messrs. *Burgoynes, Milnes & Burgoyne.*

Solicitors for other parties: Messrs. *T. White & Son;* Mr. *W. T. Reeve.*

(1) 1 Salk. 229; S. C. Fearne's C. R. 237.

MAJOR *v.* PARK LANE COMPANY.

V.-C. W.
1866
May 22, 23.

Metropolitan Building Act, 1855 (18 & 19 *Vict. c.* 122)—*Removal of Buildings —Party Structure.*

The 83rd and 85th sections of the *Metropolitan Building Act*, 1855, do not apply to the case of the mere removal of a building from an adjoining building without disturbing the party structure, and no previous notice under the Act need in such case be given.

Semble, however, that if the building sought to be removed be so constructed that its supports form part of the party structure which separates the two buildings, such notice previous to removal would be necessary, although it were not the intention of the person removing the building to make use of the party structure in the erection of new buildings.

THIS was a suit instituted by the lessee of No. 5, *Park Lane*, to restrain the Defendants from pulling down, cutting away, or interfering with the party-structure separating the Plaintiff's premises from those of the Defendants. The bill also prayed that the Defendants might be ordered to repair and make good the damage done to the Plaintiff's premises. It appeared from the evidence, that the Defendants' premises consisted of a low two-storied building adjoining the Plaintiff's premises, and that the Defendants being desirous of pulling down such building with a view to erecting new buildings, sold the materials of which the building consisted to various purchasers, who commenced the work of withdrawing the Defendants' premises from the adjoining house, which belonged to the Plaintiff. The work was proceeded with somewhat carelessly, and the Plaintiff, being alarmed at the progress of the work, instituted this suit, to restrain the acts of the Defendants and their agents; partly on the ground that, if the work of demolition were proceeded with, the Plaintiff would sustain an irreparable injury, and partly on the ground that the Defendants had not given to the Plaintiff, as the Plaintiff alleged they were bound to do, notice under the *Metropolitan Building Act*, 1855, of their intention to pull down or interfere with the party-structure which separated the two houses. As a consequence of the Defendants' works, it appeared that they had laid bare and exposed to the weather several wooden plates, which had been let

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into the Plaintiff's wall in order to serve as a support for the roof of the Defendants' building. It also appeared that the Defendants' premises were supported, in part, by a brest-summer which was let several inches into the party-structure, and that after this bill was filed, the Defendants' servants had attempted to remove it by dragging it out in a somewhat alarming manner. Before the cause came on to be heard upon the motion for an injunction, the whole of the Defendants' building was removed, and the motion was, by consent, turned into a motion for decree. The Plaintiff's case was that, having regard to the way in which the two buildings were incorporated together, the Defendants' building could not be withdrawn without "cutting into" the party-structure, and that, inasmuch as the Defendants' plans for new buildings, which were to a certain extent incomplete, contemplated the user by the Defendants of the party-structure, the usual three months' notice was required under the *Building Act*. The Defendants, on the other hand, contended that the Plaintiff had greatly exaggerated the damage done; that the Defendants had offered before suit to make good the damage; and that, inasmuch as the Defendants did not contemplate executing any work with respect to the party-structure, no notice was required by the *Building Act*.

Mr. *W. M. James*, Q.C., and Mr. *E. Charles*, for the Plaintiff, asked that, as now there was no occasion for an injunction, the Defendants might be ordered to cut out the timber plates in Plaintiff's wall, and make good the damage by sound brickwork, and pay the costs of the suit. They referred to sections 2, 9, 38, 83, and 88, of the *Metropolitan Building Act*, 1855, as shewing that no work could be done with respect to the party-structure, either by way of removal of existing buildings or the rebuilding new buildings, unless the proper notice had been given to the adjoining owner, in accordance with the Act.

Mr. *Daniel*, Q.C., and Mr. *Druce*, for the Defendants, contended that no such notice was required in order to enable a person to exercise his common law right of removing his house from the adjoining premises, although, in so doing, he might interfere with the party-structure. The Act in question only

applied to acts done by the building owner in the execution of some work with regard to the party-structure. It did not apply to mere removal.

Mr. *E. Charles*, in reply.

SIR W. PAGE WOOD, V.C.:—

The Plaintiff has no doubt felt some alarm at the manner in which the adjoining premises were being pulled down, but, in the result, it appears that he was unnecessarily alarmed. I have felt pressed during the argument with the circumstance that the brest-summer, to which reference has been made, was being dragged out in an alarming manner. But this did not occur until after the bill was filed, and the result of all the evidence shews that no serious damage has been occasioned, and the Court will not therefore interfere, unless required so to do by the *Metropolitan Building Act*. The question raised upon that Act is one of considerable moment, and if I had been satisfied that any part of the Defendants' building itself formed a part of the "party-structure," I should have been disposed to agree with the Plaintiff's contention that the removal of the Defendants' building would amount to a dealing with the party-structure so as to render notice under the *Building Act* necessary. This is a grave question which, however, it is not necessary to decide, because I am of opinion upon the whole, that this "brest-summer" cannot be considered as part of the "party-structure." I cannot accept the argument, that notice under this Act is required in every case of the mere removal of a building from the adjoining premises; but neither can I say that the building about to be removed may not form such a part of the party-structure as that it cannot be taken away without notice being given under the Act. Under all the circumstances of the case, the proper order to make will be, that the Plaintiff's bill be dismissed, the Defendants undertaking—if the Plaintiff should require them to do so—to cut out the timber plates in the Plaintiff's wall and make good the damage by sound brickwork.

Solicitors for the Plaintiff: Messrs. *Underwood & Colman.*
Solicitors for the Defendants: Messrs. *Matthews & Greetham.*

V.-C. W.
1866
May 25;
June 1, 8.

In re WEBB'S POLICY.

Assurance Company—Policy Moneys—Stakeholder—Trustee Relief Act (10 & 11 Vict. c. 96, s. 1)—Costs as between Solicitor and Client.

An assurance company, having received notice of conflicting claims to policy moneys, paid the moneys into Court under the *Trustee Relief Act*:—*Held*, that the company were entitled to their costs of appearance as between solicitor and client; but not to any charges and expenses.

THIS was an adjourned summons, on behalf of Lord *Strathmore*, seeking to vary the chief clerk's certificate, by establishing a claim upon the proceeds of a policy.

Richard James Webb, deceased, having on the 17th of May, 1864, effected a policy on his life with the *North British and Mercantile Insurance Company* for £5000, on the 16th of November, 1864, deposited this policy with the Plaintiff *John Isaacs*, to secure a debt, upon which there was now due to *Isaacs*, including interest, £1997 13*s.* 2*d.*

On the 5th of September, in the same year, *Webb* applied to Lord *Strathmore* for a loan of £1000, for which he gave Lord *Strathmore* a cheque for a like amount, which at *Webb's* request was held unpresented for several weeks. When it was presented on the 8th of December, 1864, it was dishonoured, and on the same day *Webb* called at the office of Lord *Strathmore's* solicitor, and there signed a memorandum, which, as Lord *Strathmore* contended, operated as a charge of the debt on the proceeds of the policy.

On the 30th of December, 1864, *Webb* executed a trust deed in favour of his creditors in the form prescribed by Schedule D. to the *Bankruptcy Act*, 1861. Lord *Strathmore* came in under the deed, and signed it for a sum of £1014 15*s.* 10*d.*, without stating that the debt was secured. The deed was registered on the 4th of January, 1865.

On the 11th of May, 1865, *Webb* died.

The company having notice of the deed, and also of the claims of *Isaacs* and Lord *Strathmore*, paid £4967 12*s.* (being £5000 less costs), into Court, and a Petition was presented by *Isaacs* on the

10th of January, which was referred to Chambers to have inquiries made as to the incumbrances on the fund.

The questions on the summons were, whether the policy for £5000 was effectually charged with £1000 in favour of Lord *Strathmore*, and, if so, whether Lord *Strathmore* had not, by signing the deed, renounced the benefit of the security in favour of *Webb's* general creditors.

Mr. *G. M. Giffard*, Q.C., and Mr. *Boyle*, for Lord *Strathmore*.

Mr. *De Gex*, Q.C., and Mr. *Surrage*, for the trustees of the deed.

Mr. *G. R. Harding*, for *Isaacs*.

Mr. *Wickens*, for the assurance company.

Mr. *Giffard*, in reply.

June 1. SIR W. PAGE WOOD, V.C. (after stating the facts), said, he thought it impossible to hold that the debt was made a specific charge upon the policy for £5000; and the only order would be that Lord *Strathmore* pay the costs of the application.

Mr. *Wickens*, for the assurance company, then contended that the company were entitled to costs as between solicitor and client. In an interpleader suit, no doubt the Plaintiff was entitled to costs only as between party and party; but the intention of the framers of the *Trustee Act* (10 & 11 Vict. c. 96, s. 1), was not to substitute a proceeding for an interpleader suit. It was rather to substitute a proceeding for a suit to administer a trust, and to relieve persons who held moneys belonging to others in their hands: *In re United Kingdom Life Assurance Company* (1).

The VICE-CHANCELLOR:—I think the question was argued before me, and decided, in a case of *In re Hall's Policy* (2).

Mr. *De Gex*, Q.C., and Mr. *Surrage*, for the trustees of the deed:—

There is no pretence for saying that in this case the company

(1) 6 N. R. 59. (2) 10 W. R. 37.

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are entitled to costs as between solicitor and client. The point was not argued in the case of *The United Kingdom Company.*

The position of the company here is no better or other than that of a stakeholder, and the common practice of the Court has always been to allow to such a person his costs only as between party and party. Lord *Eldon* in *Dunlop* v. *Hubbard* (1), said he did not recollect an instance of costs given upon a bill of interpleader, except as between party and party, according to the course of the Court, and he made an order accordingly in that case, though it was not one of interpleader, upon its analogy to such a case. So that the company here could not have got costs as between solicitor and client, either by filing a bill of interpleader, or by allowing themselves to be sued as Defendants. Can they alter the law by adopting this mode of proceeding?

Mr. *Wickens,* in reply.

At the conclusion of the argument, His Honour said he would consult with the Master of the Rolls, and mention the point again.

June 8. Sir W. Page Wood, V.C.:—

The only question that remains upon this matter is with regard to the right of the company to their costs as between solicitor and client.

I observe that in the case of *In re the United Kingdom Assurance Company* (2), where the Master of the Rolls had to determine upon the propriety of payment into Court by an insurance company of the proceeds of a policy, his Lordship decided that a stakeholder of this description came within the designation in the Act of "trustees, executors, administrators, or other persons having in their hands any moneys belonging to any trust;" and he appears to have given the company their costs as between solicitor and client without any argument. I have brought that decision, however, before his Lordship's attention, and after mature consideration, his Lordship has communicated to me his opinion, with

(1) 19 Ves. 205. (2) 6 N. R. 59.

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1866
In re WEBB'S POLICY.

which I entirely agree, that an assurance company, in such a case as the present, should be paid their costs as between solicitor and client, though the proceeding is in the nature of an interpleader suit. The object of the Act was to relieve not only trustees, executors, and administrators, but other persons having trust moneys in their hands, and to enable them to obtain a cheap and efficacious mode of having the rights of the parties settled. It is in every way desirable that this form of proceeding should be encouraged rather than otherwise.

I shall give this company their costs as between solicitor and client: the order comprising costs only of the appearance, and not charges and expenses.

Solicitors for the Applicant: Messrs. *Western & Son.*
Solicitors for the Trustees: Messrs. *Lawrence, Plews, & Boyer.*
Solicitor for the Petitioner: Mr. *D. Levy.*
Solicitors for the Company: Messrs. *Bircham & Co.*

BOVILL *v.* SMITH.

V.-C. W.
1866
June 20.

Pleading—Exceptions to Answer—Discovery.

In a suit to restrain an infringement of a patent which is contested on the ground of anticipation by prior user, the Plaintiff is not entitled to discovery from the Defendant in answer to a general interrogatory as to the instances of prior user on which he relies.

EXCEPTIONS to answer. The bill was one of several which had been filed for the purpose of restraining alleged infringements of the Plaintiff's patent for an improved method of grinding corn, obtained in 1849, and extended for five years by the Privy Council in 1863, in the face of sixteen caveats, which were filed by a combination of millers, who appeared and resisted, but without success, Mr. *Bovill's* application for an extension of his patent.

The bill stated a variety of proceedings, both at law and equity, in which the Plaintiff had obtained perpetual injunctions and recovered damages against persons who had infringed his patent, notwithstanding repeated attempts to invalidate the patent on the

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ground of prior user. The bill charged that the defences as to prior user, &c., relied on by the Defendant, were the same as those which had been relied on in some of the previous cases in which the Plaintiff's patent had been established, and that the same would appear if the Defendant would discover the place or places, and the manner in which he alleged the Plaintiff's invention was tried within this realm before the date of the patent.

Interrogatories had been filed, in which the Defendant was asked:

"(1.) Who does the Defendant allege to have been the true and first inventor."

"(11.) Does not the Defendant allege that the Plaintiff's invention was publicly used within this realm before the date of the Plaintiff's patent? Set forth particularly when, and in what place or places, and in what manner, does the Defendant allege that the Plaintiff's invention, or any or what part thereof, was publicly used within this realm before the date of the Plaintiff's patent."

In answer to interrogatory 1, the Defendant stated his belief that the question who was the first and true inventor was now in course of being inquired into by his solicitor, and the facts in that behalf had not yet been fully ascertained; "but such facts, so far as the same were known to me, or so far as I have the means of ascertaining the same, relate exclusively to my defence to Plaintiff's bill; and I am advised that the Plaintiff is not entitled to any discovery from me in this my answer respecting the same, and under the circumstances herein stated I decline to set forth whom I do allege to have been the first and true inventor of the said alleged invention."

In answer to interrogatory 11, the Defendant stated that he did allege that the Plaintiff's alleged invention was publicly used within this realm before the date of the patent; that the particulars of such prior user were being inquired into by his solicitor, and, as in his answer to the first interrogatory, Defendant declined, as matter relating exclusively to his defence, to set forth when, and in what place or places, he alleged prior user.

To this answer the Plaintiff excepted for insufficiency.

Mr. *Druce*, in support of the exceptions, contended that the

Plaintiff ought not to be compelled to try his right *ab initio* against every separate infringer, and that he was entitled to discover whether the defences set up by the Defendant in this suit were those which the Plaintiff had already succeeded in disproving, as such discovery, when obtained, would in effect support his (Plaintiff's) case.

He cited *Bovill* v. *Goodier* (1); *Davenport* v. *Goldberg* (2); *Attorney-General* v. *Corporation of London* (3).

Mr. *W. M. James*, Q.C., and Mr. *Little*, for the Defendant, were not called upon.

SIR W. PAGE WOOD, V.C., overruled the exceptions, observing that the Plaintiff was not entitled to inquire generally into the way in which the Defendant shaped his case in order to find out whether some of the persons alleged by him to have used the process before the date of the patent, were the persons against whom the Plaintiff had succeeded in other suits, though he might have asked if his process was the same as that used by *A. B.*, or any one person specifically named, who had been a Defendant in some former suit.

Solicitors: Messrs. *Harrison, Beal & Harrison;* Mr. *Wynne.*

(1) Law Rep. 1 Eq. 35. (2) 2 H. & M. 282.
(3) 19 L. J. (Ch.) 314.

M. R.

1866

June 22.

HICKMOTT *v.* SIMMONDS.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Assignment for benefit of Creditors—Unreasonable Provisions.*

2 Ch 370
2 Eq 277

By a deed under s. 192 of the *Bankruptcy Act*, 1861, expressed to be made between a debtor of the first part, trustees of the second part, and the several other persons whose names and seals were thereunto subscribed and set, being creditors of the debtor, and all other persons creditors of the debtor of the third part, the debtor assigned his estate to the trustees upon trust to pay to the parties thereto of the third part the sums set opposite to their respective names in the schedule, subject to the covenant thereinafter contained for verifying the amounts thereof, such covenant being to the effect, that it should be lawful for the trustees to require the amounts of the debts to be verified by solemn declaration, or in such other manner as to the trustees should seem expedient; and in the event of a creditor failing or refusing so to verify his debt, such creditor was to be excluded from all benefit of the deed:—

Held, that the deed was not binding on a creditor whose name was not in the schedule, and who had not assented.

THIS was the further consideration of a creditor's suit for the administration of the estate of *Nevil Simmonds*, an intestate. Under the decree one *Francis* had brought in a claim against the estate, in respect of two bills of exchange, dated the 14th of January, and the 29th of February, 1864, and accepted by the intestate; and the question now argued was, whether this claim was barred by reason of the intestate having, by an indenture dated the 12th of March, 1864, made an assignment for the benefit of his creditors under the provisions of the *Bankruptcy Act*, 1861.

The indenture of the 12th of March, 1864, was expressed to be made between *Nevil Simmonds* of the first part, *Mathew Henry Chaffin* and *George Baker*, trustees for themselves and the rest of the creditors of the said *Nevil Simmonds*, parties thereto, of the second part; and the several other persons whose names and seals were thereunto subscribed and set, being respectively creditors of the said *Nevil Simmonds*, and all other persons creditors of the said *Nevil Simmonds*, of the third part; and after reciting, amongst other things, that the said *Nevil Simmonds* was justly indebted to the said

parties thereto of the second and third parts in the sums set opposite to their respective names in the schedule thereunder written, it was witnessed that the said *Nevil Simmonds* thereby bargained, sold, and assigned, all his real and personal estate unto the said trustees, their heirs, executors, administrators, and assigns, upon trusts for the getting in, sale, and conversion into money of such estate; and upon trust out of the moneys to be received by virtue thereof, to pay the costs incidental to the execution of the trusts; and in the next place to pay, retain, and satisfy, rateably and proportionably, and without any preference or priority, to themselves the said trustees, and their partners, and the other persons parties thereto of the third part, the several debts or sums set opposite to their respective names in the said schedule thereto, subject to the covenant thereinafter contained for verifying the amounts thereof; and to pay the residue (if any) of the said moneys unto the said *Nevil Simmonds*, his executors, administrators, and assigns: Provided nevertheless, that such creditors of the said *Nevil Simmonds* as should not execute or assent in writing to take the benefit of the indenture on or before the 13th of June then next, or within such further time, not exceeding thirty days, as the said trustees should by writing under their respective hands and seals declare, should be excluded from all benefit thereunder. And it was thereby further covenanted and agreed by and between the said several parties thereto, that it should be lawful for the said trustees, at the expense of the trust estate, to require the amount of any debt or debts of any or either of the several creditors, parties thereto, to be verified by solemn declaration, or in such other manner as to the said trustees should seem expedient, and in the event of any such creditor or creditors refusing or failing so to verify his or their debt or debts, then such creditors so refusing or failing as aforesaid should lose all benefit, dividend, and advantage, to be derived from or otherwise claimed under the indenture; and it was also agreed that all questions relating to the trust estate should be decided according to English bankrupt law. The deed contained a release to *Simmonds* by the said several creditors parties thereto of the second and third parts.

The deed was executed by the requisite proportion of creditors, and duly registered.

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Francis' name was not contained in the schedule, and he had not assented to the deed.

Mr. *Archibald Smith*, for the Plaintiff, contended that the deed was valid and binding on non-assenting creditors. The proviso that creditors who did not assent within a fixed time should be excluded from all benefit of the deed, was *in terrorem* merely, and would not exclude a creditor who came in and assented after the time limited: *Ex parte Morgan* (1); *Ex parte Spyer* (2); *Whitmore* v. *Turquand* (3). As to the proviso enabling the trustees to require the creditors to verify their debts by solemn declaration or otherwise, similar clauses had been upheld in *Strick* v. *De Mattos* (4); *Coles* v. *Turner* (5).

Mr. *Morgan Lloyd*, and Mr. *W. W. Karslake*, for *Francis*:—

First: this deed is not for the benefit of all the creditors equally. Though it purports to be made with all the creditors of *Simmonds*, yet the effect of the recital and the declaration of trust is to confine the benefit of it to those creditors whose names are in the schedule. In *Buvelot* v. *Mills* (6), a composition deed was held to be invalid, because the benefit of it was confined to scheduled creditors. This is a stronger case, for the deed in *Buvelot* v. *Mills* contained no such recital as there is here. So in *Benham* v. *Broadhurst* (7); *Martin* v. *Gribble* (8); and *Ilderton* v. *Jewell* (9), deeds were held to be invalidated by reason of the benefit of them being confined to the creditors parties thereto.

Second: the proviso requiring the creditors to assent *in writing* is unreasonable. That was decided in the three cases last cited; also in *Dewhurst* v. *Kershaw* (10). In that case the period of three months, within which creditors are required to assent, was itself held to be unreasonable. *Ex parte Morgan* (1) and *Ex parte Spyer* (2) are not authorities on this point. In the latter case a similar clause was rejected as being unintelligible. In *Whitmore*

(1) 1 D. J. & S. 288.
(2) Ibid. 318.
(3) 3 D. F. & J. 107.
(4) 3 H. & C. 22.
(5) Law Rep. 1 C. P. 373.
(6) Law Rep. 1 Q. B. 104.
(7) 34 L. J. (Ex.) 61.
(8) Ibid. 108.
(9) 33 L. J. (C. P.) 148.
(10) 32 L. J. (Ex.) 146.

v. *Turquand* (1) the deed was not under the statute, and was not intended to bind non-assenting creditors.

Third: the condition imposed on creditors to verify their debts in such manner as the trustees may determine is unreasonable. A clause *totidem verbis* was held to vitiate the deed in *Leigh* v. *Pendlebury* (2).

Mr. *W. Pearson,* for the administratrix of the intestate.

Mr. *Archibald Smith,* in reply:—

Buvelot v. *Mills* (3) was a composition deed, and was entirely within the jurisdiction of a Court of common law; so that if a creditor could not sue on the covenant contained in the deed, he would be without remedy, and the deed must be bad. This is a trust deed; the trust is to pay the debts in the schedule; the schedule is one not of executions, but of debts; and there is nothing to prevent the trustees from inserting the debt after it has been properly verified. In *Buvelot* v. *Mills* the Judges relied much on the circumstance that the release was by the scheduled creditors only. That is not so here. The other cases cited are distinguishable, because in them the creditors who did not execute the deed were not parties to it at all.

As to the proviso excluding creditors who do not assent within a certain time, there is no case in which such a clause has been held to vitiate a deed, except where it formed part of the description of the *cestuis que trust.*

As to *Leigh* v. *Pendlebury* (2), that has been overruled by *Coles* v. *Turner* (4).

LORD ROMILLY, M. R.:—

It must be admitted that the authorities are not in a satisfactory state; but, upon the best consideration I can give to the subject, I am of opinion that this is not a deed under which this creditor could have come in.

It is difficult to reconcile *Leigh* v. *Pendlebury* with *Coles* v. *Turner,* unless the decision in *Coles* v. *Turner*—where the words

(1) 3 D. F. & J. 107.
(2) 33 L. J. (C. P.) 172.
(3) Law Rep. 1 Q. B. 104.
(4) Law Rep. 1 C. P. 373

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are, "by statutory declaration proved before the Commissioners in bankruptcy or otherwise"—is, that the words "or otherwise" refer to statutory declaration; and that if the debt be verified by statutory declaration, it may be made either before the Commissioners in bankruptcy or any other qualified person; and it was held in *Strick* v. *De Mattos* (1) that the trustees were entitled to require a statutory declaration. But it was laid down in *Leigh* v. *Pendlebury* (2) that the trustees are not entitled to determine the form in which the debts are to be verified. Here they have power to determine the form: they may say that a statutory declaration is not enough; and may require some other form. That was decided to be bad in *Leigh* v. *Pendlebury*. I should not have acted upon that decision alone, but it has a distinct bearing on the first point raised by Mr. *Morgan Lloyd*, for which he cited the case of *Buvelot* v. *Mills* (3). Though it be true that all the creditors are parties to this deed, in the sense that they are expressed to be parties to it, yet the trust is to pay the sums set opposite their names in the schedule; and though that does not require that the creditors should execute the deed, but the trustees are at liberty to put in the sums in the schedule, yet the trusts are confined to the purpose I have mentioned. And though the release is not confined to the scheduled creditor, as it was in *Buvelot* v. *Mills*, yet the Judges seem to have held, that if any creditor is not within the trusts of a deed, the deed is bad. Now, no person can have the benefit of this deed unless he is a *cestui que trust;* and no person is a *cestui que trust* unless a sum is put opposite his name; and that depends on trustees, who have an arbitrary power of saying in what way the debt is to be proved. I think, therefore, that a non-assenting creditor is not bound by this deed.

Solicitors for the Plaintiff and Defendant: Messrs. *Morris, Stone Townson, & Morris.*

Solicitors for Mr. *Francis:* Messrs. *Foster & Anderson.*

(1) 3 H. & C. 22. (2) 33 L. J. (C. P.) 172.
(3) Law Rep. 1 Q. B. 104.

REDMAYNE *v.* FORSTER.

M. R.
1866
May 29, 30, 31; June 5.

Partnership—Mortgage—Foreclosure—Account—Parties—Equitable Mortgage of Shares.

Foreclosure, and not sale, is the remedy of an equitable mortgagee of a share in a mining partnership.

The articles of a mining partnership empowered any partner to sell or dispose of his shares, but gave a right of pre-emption to the other partners. *R.*, one of the partners, made an equitable mortgage of his shares, which was assented to by the other partners, and afterwards sold the shares to *M.*, one of his co-partners:—

Held, that all the partners were necessary parties to a suit for the foreclosure of the mortgaged shares, that in default of redemption by *M.*, the other partners were entitled to take to the mortgaged shares on payment of the mortgage debt; that in default of redemption by *M.*, or the other partners, the mortgagee was entitled to foreclosure, and to an account of the profits of the partnership made after the filing of the bill, and of the existing debts and liabilities of the partnership, and to have the share of such debts and liabilities attributable to the mortgaged shares ascertained.

THIS was a suit by an equitable mortgagee of shares in a mining partnership, for the purpose of realizing the security.

In 1831, *Braddyl*, *Matthew Forster*, and *Green*, entered into partnership under the name of the *South Hetton Coal Company*, for the term of forty-two years, for the purpose of working certain coal mines. The partnership deed provided (amongst other things) that the capital should consist of the mines and the buildings, plant, &c., and of £96,000 in money, or so much thereof as might from time to time be necessary for the purposes of the partnership; that the capital should be considered as divided into sixty-four equal parts, which the partners should subscribe for, and be entitled to, in the proportions therein mentioned; that each partner should pay up his proportions of the capital by instalments at the times and in the manner therein mentioned; that no partner should be allowed to claim any of the profits or bonuses, or exercise any right by virtue of the partnership deed, until he should have paid the amount of every call in respect of his shares; that if any of the partners for the time being (except *Braddyl*, as to whose shares the deed contained special provisions) should desire to sell or

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dispose of any shares, he should offer them, at a price to be fixed as therein mentioned, first to *Braddyl*, and then to the other partners, and that in the event of all the partners declining to purchase them, the shares might be sold to any other person; that any purchaser or other person to whom any shares should be sold or assigned, should execute a deed, whereby he should covenant to abide by the provisions and agreements contained in the partnership deed, and until he should have executed such deed of covenant, should not be considered a partner as to any profits, rights, privileges, benefits, and advantages to arise from the shares sold or assigned to him, but should be considered a partner as to all duties, obligations, claims, and demands, in respect of such shares, from the time of his agreement to purchase them; and that the partnership should not be dissolved by the death of any partner, but should be continued by the survivor or survivors, in conjunction with the executors, or administrators, or legatees of the deceased partner, upon the same terms.

Between 1831 and 1838, *Burrell*, *Rawsthorne*, and *Walker*, purchased shares in the partnership, and in January, 1838, the six partners executed a deed, extending the term of the partnership to sixty-three years from that date, upon the terms of the deed of 1831; at that time *Braddyl* held thirty-two shares, *Forster* seven, *Green* five, *Burrell* five, *Rawsthorne* nine, and *Walker* six.

Before 1845 the partners had paid up, in proportion to the number of their shares, considerably more than £96,000.

In March, 1845, *Rawsthorne*, who was the solicitor of the partnership, made an equitable mortgage of five of his shares, by deposit of the deed, by which the shares had been assigned to him, to *Giles Redmayne*, for securing £12,000 and interest.

By a deed, dated the 16th of September, 1847, between *Rawsthorne* of the one part, and *Percival Forster*, the manager of the colliery, of the other part, *Rawsthorne* assigned his nine shares to *Percival Forster*, subject to a proviso for redemption on payment to *P. Forster*, as manager, of what might be found due from *Rawsthorne* to the partnership in respect of certain bills of exchange, and also on payment to *Green* (to whom *Rawsthorne* had mortgaged his other four shares) and to *Redmayne* of their respective mortgage debts; and the deed empowered *Percival Forster*, in default of pay-

ment of what might be found due to the partnership, to sell the shares (subject to the right of pre-emption on the part of the other partners reserved by the partnership deed) and declared the trusts of the purchase-money to be for the payment of the amounts respectively due to *Green*, *Redmayne*, and the partnership, and the payment of the balance to *Rawsthorne*.

Percival Forster did not execute this deed, but on the 30th of September, 1848, he wrote to *Redmayne* a letter in these terms:—

"I beg to inform you that I have received no notice of any incumbrance affecting Mr. *Rawsthorne's* shares in *South Hetton Colliery*, except a conveyance, dated 16th September, 1847, of such shares to me in trust to secure Mr. *Green*, yourself, and the colliery, what he respectively owes to them, and I also further beg to state that I shall not part with such conveyance until I receive your written assurance that the principal and interest owing to you are satisfied, nor shall I pay any part of the profits of the shares without communicating with you, such shares, as far as I am aware, being subject to no liability except as between the partners for the calls payable in respect of them. I give you this information at Mr. *Rawsthorne's* request, and for your satisfaction."

The deed of the 16th of September, 1847, was found in the custody of the partners when this suit was instituted and they could give no account of the time or manner of its coming into their custody, but there was some evidence to shew that they had notice of it shortly after its execution.

In 1846, *Braddyl* being insolvent and having incumbered his shares, and the partnership being subject to liabilities estimated at £260,000, an arrangement was made between *Braddyl* and his incumbrancers and the other partners (including *Rawsthorne*), by a deed dated the 9th of September, 1846, whereby the other partners agreed to pay and satisfy *Braddyl's* share of the liabilities of the partnership, and all calls or other moneys which otherwise might or ought to be made upon or provided for by him in respect of his shares, and it was agreed that the other partners might sell *Braddyl's* shares, and apply the purchase money in the first instance in payment of such calls or moneys, and that in the meantime the profits of the shares should be applied in payment,

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first, of certain bills of exchange drawn by *Braddyl* upon the partnership, next of certain incumbrances upon his shares, and next of the moneys so to be paid by the other partners in respect of his shares. The shares were to be sold at a valuation to be made at the time of sale, and such valuation was to be made without reference to any debts or liabilities then affecting the partnership.

By an agreement, dated the 13th of August, 1847, between *Matthew Forster*, *Green*, *Burrell*, *Rawsthorne*, and *Walker*, it was agreed that seventeen of *Braddyl's* shares should be taken by *Matthew Forster*, four by *Burrell*, and one by *Green*, at a price therein mentioned, free of existing debt; that the five parties to the agreement should be liable for the existing debt of the partnership in proportion to their original shares; that the purchase-money for the shares taken under the agreement should be paid by instalments on each share equal to the calls which should be paid by the parties on each of their original shares; that the ultimate balance (if any) due in respect of the price of the shares so taken after all calls on the original shares should have been paid or discharged should be set off against the profits of the shares so taken; and that, as between the parties to the agreement, each original share and each of the shares so taken should make the holder liable to all debts incurred subsequently to the agreement.

By another agreement between *Braddyl*, his incumbrancers, and the other partners, dated the 18th of February, 1849, the sale of *Braddyl's* twenty-two shares to *Matthew Forster*, *Burrell*, and *Green*, was confirmed, and it was agreed that the sale of his ten remaining shares should be postponed until October, 1853, and that the profits on the ten shares in the meantime should be subject only to payment of the interest on the balance of his share of the debts of the partnership, after deducting the price of the twenty-two shares sold.

By a deed dated the 13th of May, 1850, between the partners, other than *Braddyl*, it was agreed that three of the shares taken by *Burrell* under the agreement of August, 1847, should be given up by him and taken by *Matthew Forster* on the same terms, that is to say, free from debt existing on the 13th of August, 1847.

In October, 1847, *Matthew Forster* assigned one of his shares to *Percival Forster* the younger. In 1850 *Rawsthorne* sold his nine

shares to *Matthew Forster*, and by a deed dated the 8th of November, 1851, to which *Green*, *Burrell*, and *Walker* were parties, these shares were assigned to *Matthew Forster*, subject to the liabilities of the partnership and to the claims of *Green* and *Redmayne*.

In 1858 *Braddyl's* ten remaining shares were sold and transferred to *Matthew Forster*, who afterwards assigned one of such shares to *Burrell*, and one to *Green*.

In every year, except three, between 1845 and 1860, the collieries were worked at a profit, but no profits were divided, the whole having been expended in improving and extending the colliery, and in keeping down the interest on the debts of the partnership; and calls were made during that period, by agreement between the partners, amounting to £3450 per share. The greater part of these calls had not been paid by *Rawsthorne*, and his shares had been debited with the unpaid calls with compound interest.

Redmayne was not a party to, and had no notice of, any of the transactions between the partners. He died in 1857. The whole of his mortgage debt, with a considerable arrear of interest, was due to his estate.

Rawsthorne died insolvent in 1854; *Green* died in 1858.

In 1860 *Redmayne's* administratrix filed the bill in this suit against *Percival Forster*, *Braddyl*, *Matthew Forster*, *Burrell*, *Walker*, the executors of *Green*, and *Percival Forster* the younger, praying that an account might be taken of what was due to her upon the mortgage; that proper directions might be given for making the five mortgaged shares available to pay the debt; that an account might be taken of the dealings of the partnership, so far as might be necessary for ascertaining and adjusting the equities between the Plaintiff and the Defendants; and that it might be declared that calls made after the date of the mortgage, by virtue of any new agreement made after that time without the consent of *Redmayne*, were not chargeable to the mortgaged shares as against the Plaintiff, and that as between the Plaintiff and the Defendants the thirty-two shares which formerly belonged to *Braddyl* were subject to bear equally with the other shares their rateable proportion of the debts, liabilities, and losses of the partnership.

Burrell died after the institution of the suit, and his executors were made parties by amendment.

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The Defendants, by their answers, insisted that the Plaintiff could only stand in the place of *Rawsthorne*, and was bound by all the arrangements between the partners, and that the shares, as against her, were chargeable with the unpaid calls; and they produced accounts shewing that the amount of the unpaid calls far exceeded the value of the shares.

The executors of *Burrell* and *Green* also insisted that, having regard to the provisions of the partnership deed, *Rawsthorne* had no right, as between himself and the other partners, to mortgage his shares; that the Plaintiff was, by the provisions of the partnership deed, precluded from suing until she had paid the calls due in respect of the mortgaged shares; that her remedy (if any) was against *Matthew Forster* alone; and that the accounts of the partnership could not be taken in this suit.

The Plaintiff alleged that the accounts of the partnership had been so kept as to relieve the holders of the shares originally held by *Braddyl* from their proper share of the liabilities of the partnership, and that the purchase money of those shares, and the calls made since 1846 on the other shares, instead of being applied in discharge of the previously existing liabilities, had been expended on the collieries. This, however, was denied by the Defendants, who asserted that such purchase money and calls had been applied, so far as they would go, in paying off the debts existing in 1846. Both parties relied, in support of their respective views as to this question, upon the accounts furnished by the Defendants, which were extremely complicated.

This was the hearing of the cause.

The *Attorney-General* (Sir *R. Palmer*), Mr. *Cole*, Q.C., and Mr. *Wickens*, for the Plaintiff:—

The Plaintiff is entitled to a decree for the foreclosure of the mortgaged shares, and to an account of the assets and liabilities and the profits of the partnership. In taking that account, as between the Plaintiff and the owners of the other shares, the mortgaged shares must be treated as unaffected by liabilities created by virtue of arrangements made subsequently to, and with notice of the mortgage, and without the mortgagee's consent. The Plaintiff, however, does not object to the arrangement re-

lating to the sale of *Braddyl's* shares, if it is fairly carried out in accordance with the four agreements of the 9th of September, 1846, the 13th of August, 1847, the 18th of February, 1849, and the 13th of May, 1850. According to the true construction of those agreements, *Braddyl's* shares were sold free from the liabilities of the partnership which existed in September, 1846; but subject equally with the other shares to all liabilities subsequently incurred, and the purchase-money was applicable to the payment of a moiety of the liabilities in 1846. We ask, therefore, for a declaration that she is not chargeable with any calls except such as have been made for the purpose of satisfying the liabilities existing in September, 1846, or for the necessary expenses of the colliery, and that the shares sold by *Braddyl* are equally liable with the other shares to the debts and liabilities incurred after that time, and that the price of those shares must be applied in the payment of a moiety of the debts and liabilities existing on the 9th of September, 1846.

Sir *H. Cairns*, Q.C., Mr. *Baggallay*, Q.C., and Mr. *Bedwell*, for the *Forsters* and *Walker*:—

The right of an equitable mortgagee is not foreclosure, but sale: *Tuckley* v. *Thompson* (1), especially when the mortgaged property consists of a share in a trading partnership. We do not deny the Plaintiff's right to a sale in default of payment of the mortgage debt, and to an account with a view of ascertaining what it is that is to be sold. But the Plaintiff can only stand in the place of the mortgagors, and cannot, after lying by for so many years, and allowing the mortgagor to deal with the other partners as the absolute owner of the shares, repudiate the arrangements made between the partners for the common benefit of the partnership. It would be inequitable that the Plaintiff should get the benefit of the improvement of the colliery by the expenditure of additional capital brought in by the other partners without contributing the proportion which the mortgaged shares ought to bear. According to the true construction of the agreements relating to *Braddyl's* shares, those shares were to be sold free from the liabilities existing, not on the 9th of September, 1846, but at the time of

(1) 1 J. & H. 126.

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the sale of the shares; but in fact the calls which have been made since 1846 have been applied solely for the purposes mentioned in the declaration for which the Plaintiff now asks; and it would be contrary to the practice of the Court, merely because the parties differently interpret the accounts which have been rendered, to insert declarations in the decree which, upon taking the accounts, may prove superfluous. In *Pole* v. *Leask* (1) Lord *Kingsdown* disapproved of the insertion of declarations in a decree for an account where there is no principle upon which the parties are at issue.

Mr. *Selwyn*, Q.C., and Mr. *Simpson*, for the executors of *Burrell* and *Green*:—

The partners, other than *Matthew Forster*, are improperly made parties to the suit. A mine is in the nature of an ordinary trading partnership, and no partner can, without the consent of his co-partners, give to a stranger the rights of a partner. In this case the partnership deed expressly qualifies the right of any partner to sell his shares, by giving the right of pre-emption to the other partners, and by requiring a purchaser to execute a deed of covenant to abide by the terms of the deed. There is, therefore, no privity between the Plaintiff and the Defendants: *Clegg* v. *Fishwick* (2). In *Brown* v. *De Tastet* (3), the assignee of a share in a partnership obtained a decree for an account against the assignor alone, and the bill was dismissed against the other partners. The utmost right of the present Plaintiff is to have an account against *Matthew Forster* alone, or possibly to institute a suit in his name for an account of the dealings of the partnership.

The *Attorney-General*, in reply:—

An equitable mortgagee is entitled to foreclosure: *Parker* v. *Housefield* (4), and so is a mortgagee of personalty: *Slade* v. *Rigg* (5). The right of a mortgagee, as an assignee *pro tanto* of a share in a partnership, to have an account against the partners of his mortgagor, was established in *Bentley* v. *Bates* (6). The deed of the

(1) 33 L. J. (Ch.) 155.
(2) 1 Mac. & G. 294.
(3) Jac. 284.
(4) 2 My. & K. 419.
(5) 3 Hare, 35.
(6) 4 Y. & C. Ex. 182.

16th of September, 1847, the letter of *Percival Forster* to *Redmayne* accepting the trust of *Rawsthorne's* shares, and the express reference to *Redmayne's* claim in the assignment of *Rawsthorne's* shares to *Matthew Forster*, prove that the other partners assented to the mortgage.

[The MASTER OF THE ROLLS:—I am satisfied that they assented.]

The declarations for which the Plaintiff asks are necessary for the purpose of laying down the principle on which the accounts are to be taken, and depend upon the construction of deeds, and the principles of law which govern the rights of partners and their mortgagees, not, as in *Pole* v. *Leask* (1), upon questions of fact.

June 5. LORD ROMILLY, M.R.:—

This case was argued at great length and very elaborately, but I think it unnecessary to go through all the facts of the case for the purpose of explaining the decree I think it proper to pronounce. Shortly the facts may be stated thus: A company was formed, or rather an old company was re-modelled, in January, 1838, for the purpose of working certain collieries; it was divided into sixty-four shares, of which *Braddyl* held thirty-two, *Rawsthorne* nine, *Matthew Forster* seven, *Green* five, *Burrell* five, and *Walker* six. In March, 1845, *Rawsthorne* mortgaged five of his shares to *Redmayne*, who is now represented by the Plaintiff, and he also mortgaged the remaining four to *Green*. In 1847 *Percival Forster* was the manager of the collieries, and by a deed of the 16th of September, 1847, *Rawsthorne* assigned his nine shares to *Percival Forster*, subject as to five to the mortgage to *Redmayne*, and as to the other four to the mortgage to *Green*, upon certain trusts stated in that deed. *Percival Forster* did not execute the deed, but by a letter in September, 1848, he accepted the trusteeship, and he undertook to hold the shares upon the trusts thereby imposed upon him, and not to deal with the shares in any way, except after notice to *Redmayne*. In 1850 *Rawsthorne* sold his nine shares, subject to these mortgages, to *Matthew Forster*. In 1846 *Braddyl* became insolvent,

(1) 33 L. J. (Ch.) 155.

S.C. Lofft 166. 2 Beav. 562. 4 Jur. N.S. 1104.

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and under various deeds, which I am not going to state in detail, twenty-eight of his shares became vested in *Matthew Forster*, two in *Green*, and two in *Burrell*. This was finally accomplished in 1858. A long argument has been addressed to me as to the proper construction to be put upon the four deeds in question, which bear date respectively the 9th of September, 1846, the 13th of August, 1847, the 18th of February, 1849, and the 13th of May, 1850, and the question arises in this way; all *Braddyl's* shares were to be sold, and were sold, although at different periods of time, as free shares, that is to say, they were sold as not liable to contribute towards the moneys due for working the collieries previously to the date of such sale, but the holders were to be liable to contribute their rateable proportion of what might be subsequently required for the due working of the collieries, and the purchase-moneys derived from the sale of the shares were to be applied in paying the moneys due from the former holder of the shares in respect of the previous expense of the collieries. Now if these shares had been sold to strangers, it would probably not have given rise to much difficulty; it would have been easy to distinguish the rights of the holders, and to take the accounts between them and the former proprietors; but they were all bought by former proprietors, and in consequence of this a confusion has arisen, as to what shares in the hands of the same holders are liable to any, and, if any, to what contribution, and this will of course affect the shares which were mortgaged to the Plaintiff's testator. Nothing has been paid or distributed in the way of profits since the date of the mortgage. The bill is brought for foreclosure of the five shares mortgaged, and the only question is the form of account which I ought to direct, and the declaration, if any, which I ought to make for the purpose of taking such account.

The history of the colliery is this: every year the price of the coals sold exceeded the cash expended for winning them, and in that sense it is said that the colliery always made profits; but on the other hand it became necessary every year to make expensive works for the purpose of maintaining and working the colliery, the expense of which not only absorbed all the profits, but required considerable additional outlay, the money for which was produced by calls on the shareholders in proportion to the shares which

they held. The result has been, that, though no profits have been divided for many years, the debts owed by the concern and attaching to the shares are diminished, and the collieries themselves are extended, and the value of them is improved. I do not think that the law on this subject is open to much question, but the facts are in dispute, and it would not only be useless, but produce some injury, and therefore be worse than useless, if I were to make declarations as to the particular mode of taking accounts upon a supposed state of facts, which is neither proved nor admitted. The law, which I think is clear, is this, that the Plaintiff is entitled to payment of what is due to her upon her mortgage, or in default of such payment to foreclosure of the shares mortgaged. In taking this account she is not, in my opinion, entitled to ask for any account of profits paid or distributed before she filed her bill; nor is she entitled to contest any call upon the shareholders, or to require them to account for their previous management of the colliery; and in ascertaining what the Plaintiff's shares are, which may either become hers by foreclosure, or may, by arrangement, be sold, she is entitled to say that no extra burden should be thrown upon her shares, or upon any class of shares to which her shares belong, which is not so thrown in accordance with some contract or agreement in force at the time when the shares were mortgaged to *Redmayne*. The Plaintiff says that this has been done, the Defendants deny it, and I cannot make any declaration on a speculative suggestion of facts. I have stated generally the view which I take of the matter, and the mode in which I shall take the account. I think I ought to make a decree to the following effect, which I believe will enable the Court to do justice, upon further consideration, between the parties. In the first place, I shall direct an account of what is due to the Plaintiff for principal, interest, and costs, and then I shall make the usual foreclosure decree against *Matthew Forster*; I intend also to give the other shareholders leave, if *Forster* does not pay the amount due, to take the shares by paying the amount due, by which I do not mean to give successive decrees of foreclosure and redemption, as is the case where there are subsequent mortgagees, but, if *Forster* does not pay upon the particular day appointed, I mean to direct that the other shareholders may upon a day named, say a month

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from that time, jointly or severally take the shares if they please, and, if not, then the shares are foreclosed. Then if the Plaintiff is paid, she has nothing more to do with the concern; but if she is not paid, then I think she is entitled, for she then becomes a partner, to take an account of what are the debts and liabilities which the partnership is now liable to pay, and to ascertain what proportion of such debts and liabilities, as between the Plaintiff and the other partners, is properly attributable to the five shares mortgaged by *Rawsthorne* to *Redmayne*. I shall reserve further consideration and the subsequent costs of the suit. If the Plaintiff is paid, no question will arise, if not, then I shall take this account, and on further consideration I shall deal with it as I think fit.

It is to be observed that, in my opinion, the other Defendants are all necessary parties to this suit, because it is in substance one in which each partner is at liberty to buy the shares, if the others do not, and he is entitled to see that the account, which fixes the amount upon payment of which he may take them, is properly taken; and also because if the Plaintiff is not paid, she thereupon becomes a partner in the mine and entitled to see that the accounts are properly taken, so that if she thinks fit to sell her shares she may be able to tell the purchaser what it is that she has to sell.

Therefore the Plaintiff is entitled, in default of redemption or purchase by the other partners, to an account of all the proceeds of the colliery, and also to know what of the debts and liabilities attaching to the concern at this time are properly attributable to her shares. That is the substance of the decree which I propose to make.

Solicitors for the Plaintiff: Messrs. *Underwood & Colman.*

Solicitors for the Defendants: Messrs. *Oliverson & Co.*; Messrs. *Horn & Murray.*

ATTWOOD *v.* ALFORD.

M. R.

1866

June 27.

Will—Construction—Gift of Income of a Fund for Maintenance—Gift, original or substitutionary.

A gift of the income to arise from a fund during the life of *A.* to *B.*, for his maintenance, is an absolute gift to *B.*, his executors and administrators, during the life of *A.*, and is not confined to the joint lives of *A.* and *B.*

A gift to the sisters of the testator living at a particular time, or the issue of any or either then dead, is not a substitutionary, but a substantive gift to the issue.

JOHN LUSH ALFORD made his will, dated the 22nd of May, 1849, and afterwards a codicil, dated the 2nd of August, 1849, whereby, after revoking the gifts made by his will, he gave his real and personal estate to trustees upon trust to sell and convert the whole thereof into money, and invest in government security; and out of the dividends or interest accruing therefrom to allow yearly for the maintenance of his sister *Emily* the sum of £50, and for that of his mother the like sum. The codicil then proceeded: "And upon trust to divide the residue of the dividends and interest during their joint lives, and after the death of either of them, between my other sisters for their maintenance, and after the death of both, then to divide the principal between my sisters then living, or the lawful issue of any or either then dead, the issue taking *per stirpes* and not *per capita*."

The testator survived his mother, and died in 1861. He had six sisters, three of whom, *Eliza*, *Caroline*, and *Emily*, survived him. Of these *Eliza* and *Caroline* subsequently died without issue; *Emily* was still living. Of the other three two died in his lifetime without issue; the third, Mrs. *Guy*, died on the 26th of March, 1853, leaving issue two children, one of whom, *Mary Ellen Guy*, survived the testator.

The suit was instituted for the administration of the testator's estate, and now came on to be heard on further consideration.

Mr. *Baggallay*, Q.C., and Mr. *G. W. Lawrence*, for the trustees of the will.

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Mr. *Selwyn*, Q.C., and Mr. *Speed*, for the representatives of *Eliza*, claimed that after provision had been made for payment of *Emily's* annuity, the testator's estate should be divided amongst the next of kin of the testator. The fund was given to the testator's sisters other than *Emily* in the first instance; this was followed by a substitutionary gift to the issue of any sister who might be dead at the time of distribution. In order that the issue of a sister might be entitled to claim under that gift, the parent of such issue must have been entitled so to claim if living: *Ive* v. *King* (1); *Congreve* v. *Palmer* (2); *Christopherson* v. *Naylor* (3); *Butter* v. *Ommaney* (4); *Jarman* on Wills (5). Here the only sister who left issue died in the lifetime of the testator, and could not participate in the original gift. The whole scheme failed, and there was an intestacy.

Mr. *Shapter*, Q.C., and Mr. *Busk*, for the representatives of *Caroline*, claimed the income of one moiety of the fund during the lifetime of *Emily*. The words "for maintenance" simply expressed the motive of the testator in making the gift to his sister: *Bayne* v. *Crowther* (6); and the representatives of the sisters who survived the testator were entitled to the income of the fund so long as *Emily* lived.

Mr. *Southgate*, Q.C., and Mr. *Hemming*, for *Mary Ellen Guy*, claimed the whole fund, subject to *Emily's* annuity. The gift conferred a vested interest on the issue of any sister; and, the fund being a mixed fund of the proceeds of realty and personalty, the gift of the capital carried the income along with it: *Genery* v. *Fitzgerald* (7).

LORD ROMILLY, M.R.:—

This is not the case of a substitutionary gift at all, but of a substantive gift to the issue. The testator does not say, in case any one of my sisters shall be dead at the period of distribution, her issue are to take their parents' share; but the gift is to his

(1) 16 Beav. 46.
(2) Ibid. 435.
(3) 1 Mer. 320.
(4) 4 Russ. 70.
(5) Vol. ii. p. 722.
(6) 20 Beav. 400.
(7) Jac. 468.

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sisters then living, or the lawful issue of any or either of them then dead. I have not now to consider what would be the effect of this if one sister had survived the period of distribution, and another had died leaving issue. I am of opinion that if there are no sisters then living, the issue of a deceased sister are to take. On the other question I am of opinion that the case of *Bayne* v. *Crowther* (1), which was cited, is exactly in point, and that there is a clear gift of the income to the sisters living at the death of the testator during the life of *Emily*.

Solicitors for the Plaintiff and some of the Defendants: Messrs. *Taylor, Hoare, & Taylor.*

Solicitors for the other Defendants: Messrs. *Venning, Naylor, & Robins;* Mr. *H. Wickens.*

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M. R.
1866
June 29;
July 2.

Marriage Articles—Infant—Election.

Where marriage articles, executed when the lady was a minor, contained a covenant by the husband to settle her interest in real and personal estate, including after-acquired property, on the usual trusts, and she died without having confirmed the articles, leaving her husband surviving, and an only child, her heiress-at-law, who claimed an interest under the articles in the personal estate, and also claimed the real estate attempted to be settled as heiress-at-law of her mother:—

Held, that the heiress-at-law was put to her election whether she would take under or against the settlement.

BY an indenture dated the 15th of August, 1853, being articles for a settlement entered into before the marriage of *George Brown* and *Catharine Louisa Smyth*, then an infant, after a recital that *Catharine Louisa Smyth* was entitled under the will of her late grandfather, *W. Randall*, the elder, to a share in his real and personal estate, and that a suit of *Lett* v. *Randall* was then pending for the administration of his estate, and that she was also entitled to other real and personal estate under the will of *Sarah Randall*, and had been admitted to a portion of the copyhold estate,

(1) 20 Beav. 400.

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and that she was also entitled to a moiety of a sum of stock, to which it was agreed that *George Brown* should become absolutely entitled,—it was agreed between the parties, and *George Brown* covenanted with the trustees that he would concur with *Catharine Louisa Smyth* in conveying the shares in the real estate, and would assign the shares in leasehold or other personal estate to which *Catharine Louisa Smyth*, or himself in her right, might become entitled under the wills of *W. Randall* the elder, and *S. Randall;* and further, that he would in like manner convey and assign all future-acquired real and personal property to the trustees of the articles, and that the estates and premises so covenanted to be assured should be held in trust for *Catharine Louisa Smyth* for life, and after her decease, for *George Brown* for life, if he should survive her, and after her decease for all the children or child (if only one) of the marriage.

In 1854, shortly after the marriage, *Catharine Louisa Brown* attained the age of twenty-one, and she died in 1859 without having executed any settlement in pursuance of the articles, or having confirmed the same, and leaving her husband and *Catharine Frances Brown*, the Plaintiff in the suit, her only child and heiress-at-law, her surviving.

By a decree in the suit of *Lett* v. *Randall*, dated the 25th of June, 1855, it was declared that the devise and bequest contained in the will of *W. Randall* the elder, under which *Catharine Louisa Brown* was supposed to be interested, was void for remoteness, and that he had died intestate as to real estate. By the effect of this decree *Catharine Louisa Brown* took no interest under the will of *W. Randall* the elder, and his real estate, subject to certain life interests, descended to his son, *W. Randall* the younger, who died in 1854, and passed under his will, by which he devised and bequeathed a share of his real and personal estate to *Catharine Louisa Brown* which was equal to that to which she was supposed to be entitled under the will of her grandfather.

Questions arose as to the rights of the Plaintiff, *Catharine Frances Brown*, who was an infant, with respect to the real estate to which her mother, *Catharine Louisa Brown*, was entitled at the date of the articles, or to which she subsequently became entitled, and the present suit was instituted that her rights might be ascertained.

The Defendants, namely *George Brown*, the father of the Plaintiff, and the trustees of the marriage articles, alleged that all such real estates were bound by the articles, and ought to be included in any settlement to be made pursuant thereto; or, at all events, that the Plaintiff was bound to elect whether she would take under or against the articles; and that, in case she should elect to take against the articles, the Defendant *George Brown* was entitled to be compensated out of the personal estate subject to the articles, for the loss of the life interest in the real estate to which he would be entitled under the articles.

The Plaintiff's contention was, that as her mother was an infant at the date of the articles, and did not confirm the same, the articles were inoperative as to real estate, and the Plaintiff was not put to her election.

The bill prayed that the articles might be specifically performed as regarded the personal estate before referred to, and that the rights of the Plaintiff as to the real estate might be declared, and that the same might be conveyed and assured upon the trusts of the settlement.

Mr. *William Pearson*, for the Plaintiff:—

In this case, as Mrs. *Brown* was an infant at the time of her marriage, and had done nothing to confirm the marriage articles, the articles were inoperative, and no case of election arose. The case is governed by *Campbell* v. *Ingilby* (1), where, by marriage articles, certain real and personal estates, to which a lady was supposed to be entitled, were agreed to be settled upon trust for the husband and wife and the children of the marriage. The lady was afterwards found to have been an infant at the time of the marriage, and the articles were held to be inoperative as regarded the real estate only, and she and her heirs were held not bound to elect either to give effect to the settlement as to the real estate, or to give up the interest in the personal estate conferred on her by the settlement. That case came on by appeal, though not on this question, before the Lords Justices (2), and your Lordship's judgment was affirmed. In *Field* v. *Moore* (3), where a settlement was made on a ward of Court after her marriage by order of the Court, and

(1) 21 Beav. 567. (2) 1 De G. & J. 393. (3) 19 Beav. 176

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the husband covenanted to convey all the real estate of his wife, but the wife who executed the settlement did not acknowledge it—on her death it was held that the wife's heir-at-law was not bound by the incomplete settlement. Here, too, the Plaintiff is not bound by the articles, and no case of election arises.

Mr. *Freeling*, for the Defendant *George Brown*:—

The Plaintiff is bound to elect whether she will take under or against the articles. The case is not governed by *Campbell* v. *Ingilby* (1), as there the heir took nothing under the settlement, and the present Plaintiff asks the Court to perform one part of the settlement without the other. The case rather resembles *Anderson* v. *Abbott* (2), where a husband and wife, by a post nuptial settlement, covenanted to settle after-acquired property, and during the coverture part of such property was allowed by the husband to be paid to the trustees, and the other part was not reduced into possession at the husband's death. It was there held that, the wife refusing after the death of her husband to perform her covenant, she was not entitled to a life interest in the portion settled, and that it was applicable to recoup the capital which, if the settlement had been carried into effect on both sides, would have gone to the children. So in *Willoughby* v. *Middleton* (3), where a married woman who, by her marriage settlement, executed when a minor, covenanted to settle future-acquired property, and had acquired by bequest personal property to her separate use, she was held by Vice-Chancellor *Wood* to be bound to elect either to bring the bequest into settlement, or to make compensation out of a reversionary interest to which she would become entitled under the settlement for her separate use. The Court will not help a Plaintiff who, as in this case, claims a benefit under part only of a settlement.

[He also referred to *Pulteney* v. *The Earl of Darlington* (4)].

Mr. *Graham Hastings*, for the trustees.

Mr. *Pearson*, in reply.

(1) 21 Beav. 567; 1 De G. & J. 393.
(2) 23 Beav. 457.
(3) 2 J. & H. 344.
(4) 7 Bro. P. C. 530.

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LORD ROMILLY, M.R.:—

Upon this question I think the proper conclusion to come to is, that the case of *Anderson* v. *Abbott* (1), applies, and not the case of *Campbell* v. *Ingilby* (2), both of which were decisions of mine, and both of which have been in one sense affirmed, that is to say, *Anderson* v. *Abbott* (1) has been followed by Vice-Chancellor Sir *W. P. Wood* in *Willoughby* v. *Middleton* (3), and *Campbell* v. *Ingilby* was expressly affirmed upon appeal (4), but not upon the ground upon which I gave my judgment. I think, however, that there are some observations of mine in the judgment of *Campbell* v. *Ingilby* which seem to carry it further than I am disposed to think upon reflection is desirable.

I think the real principle to be found in these cases is this, that if the person who claims the real estate as heir-at-law of the infant, whose settlement was unable to affect it, has no benefit and claims nothing whatever under the settlement, which was the case of the Plaintiff in *Campbell* v. *Ingilby*, then the principle of that case applies. There the person who claims as heir-at-law has nothing to do with the settlement which affected to settle the property of his ancestor. He says: "The settlement has not bound the property, and therefore I claim it." And he is entitled to do this, though it may be that, from extraneous circumstances, and by some separate and independent cause, he has obtained some benefit under the settlement. This would not raise any case of election.

This is according to the ordinary rule in cases of election, as, for instance, if a person disposes of the property of *A.* by his will, *A.* cannot take the benefits given to him under the will without giving up the property which the testator has disposed of; but if it happens that the legatee or devisee of other property disposed of by the will, leaves that property to *A.*, or dies intestate, and *A.*, as his heir-at-law or next of kin, acquires some of the property disposed of by the will of the testator, then no case of election arises at all, because *A.* takes it independently and by a separate and distinct course. That is a principle well recognised in all cases of

(1) 23 Beav. 457.
(2) 21 Beav. 567.
(3) 2 J. & H. 344.
(4) 1 De G. & J. 393.

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election, and would, if the Plaintiff were in a similar position, apply here.

But if a person comes in directly under the settlement, and asks to have the benefit of such of its provisions as give him an advantage, and at the same time claims adversely to what was intended to be the rest of the settlement, because it was not binding, then I think a case of election does arise, as in the case of *Anderson* v. *Abbott* (1). In the present case, the Plaintiff comes in and claims directly under the limitations of the personal estate for her benefit under the settlement, and claims the real estate adversely to the settlement, on the ground that in the event the settlement did not bind it. I think, therefore, that she claims beneficially under the settlement directly, and that consequently she must elect whether she will take adversely to it or under it; if the latter, she must give effect to the whole of it as far as she can.

But as the Plaintiff is an infant there will be a reference to Chambers to inquire whether it will be for the Plaintiff's benefit to elect to take under or against the settlement.

Solicitors: Messrs. *Loftus, Vizard, Crowder, & Anstie.*

(1) 23 Beav. 457.

In re MAINWARING'S SETTLEMENT.

V.-C. W.
1866
June 9, 11.

Marriage Settlement—Assignment by Wife of future Property—Covenant by Husband to settle after-acquired Property of Wife—Bequest to Wife for her Separate Use free from the Husband's Debts and Engagements.

An assignment by an intended wife of her future property, followed by a covenant by the intended husband to settle the after-acquired property of the wife, will not extend to property given to the wife in terms which are inconsistent with the trusts of the settlement.

Therefore, where an intended wife, by an ante-nuptial settlement, assigned all the personal estate *to which she might at any time thereafter become entitled in any way howsoever*, upon the trusts of the settlement; and the deed contained a covenant by the intended husband to settle *any real or personal estate whatsoever* that should descend to, devolve upon, or vest in the wife; and where a legacy was, after the marriage, bequeathed to the wife, with a direction to the executors to pay such part of the legacy to the wife as she might require *for her separate use, independent of her husband, and to be free in all respects from his debts and engagements*:—

Held, that the settlement had no operation upon such part of the legacy as was required by the wife to be paid to her upon her separate receipt.

BY an ante-nuptial marriage settlement, dated the 11th of July, 1843, and made between *Emma Elizabeth Warren*, spinster, of the first part; *Arthur Mainwaring*, of the second part; and *Richard Pelham Warren*, the Rev. *Henry Warren*, and *William Fletcher Boughey*, of the third part; after reciting that the said *E. E. Warren* was entitled expectant on the death of her mother, *Penelope Warren*, and also in possession, to certain principal moneys, stocks, funds, and securities, parts, shares, and other personal property mentioned in the schedule thereto, it was recited and witnessed as follows:—

"And whereas a marriage hath been agreed upon, and is intended shortly to be solemnized, between the said *Arthur Mainwaring* and *Emma Elizabeth Warren*, and in contemplation of the said intended marriage it hath been agreed that the said *Emma Elizabeth Warren* shall transfer and assign to the said *Richard Pelham Warren*, *Henry Warren*, and *William Fletcher Boughey*, as well the several principal moneys, stocks, funds and securities, parts and shares, and other the personal property to which she is

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entitled as aforesaid, subject to the life estate therein of her mother, the said *Penelope Warren*, as also all and singular the principal moneys, stocks, funds, and securities, to which she is entitled as aforesaid in possession, upon the trusts hereinafter expressed and declared of and concerning the same respectively: Now this indenture witnesseth, that in further pursuance of the agreement in this behalf, and in consideration of the said intended marriage, she, the said *Emma Elizabeth Warren*, with the privity and consent of the said *Arthur Mainwaring* (testified by his executing these presents), and according to the nature and tenure of the property respectively, doth by this deed bargain, sell, assign, transfer, and set over, and the said *Arthur Mainwaring* doth hereby ratify and confirm unto the said *Richard Pelham Warren*, *Henry Warren*, and *William Fletcher Boughey*, their executors, administrators, and assigns, all and singular the principal moneys, stocks, funds, and securities, parts, shares, and proportions of her the said *Emma Elizabeth Warren*, particularly mentioned and specified in the two several schedules hereunder written, or hereunto annexed, and all interest, dividends, and annual profits now due, or hereafter to become due upon the same several moneys, stocks, funds, and securities respectively, and every of them, and every part thereof, and all other the personal estate to which the said *Emma Elizabeth Warren* now is entitled in possession, remainder, contingency, or otherwise howsoever, or to which she may at any time hereafter become entitled in any way howsoever, and all the estate, right, title, interest, property, possibility, benefits, claim, and demand, whatsoever, both at law and in equity, of her, the said *Emma Elizabeth Warren*, of, in, and to the same, and every part thereof respectively: To have, hold, receive, and take the principal moneys, stocks, funds, and securities, parts, shares, and proportions, and all and singular other the premises hereby transferred and assigned, or intended so to be, unto the said *Richard Pelham Warren*, *Henry Warren*, and *William Fletcher Boughey*, their executors, administrators, and assigns, according to the nature and quality thereof respectively: In trust for the said *Emma Elizabeth Warren*, her executors, administrators, and assigns, until the said intended marriage shall be solemnized, and after the solemnization thereof, upon the several

trusts, and for the several ends, intents, and purposes hereinafter expressed, declared, and contained, of and concerning the same." And it was thereby declared that the said trust funds and securities thereby assigned should be held upon trust during the joint lives of the said *Arthur Mainwaring* and *Emma Elizabeth Warren*, to pay the income to such persons, and for such intents and purposes, as the said *Emma Elizabeth Warren* should in writing, notwithstanding coverture, direct or appoint, but not so as to dispose of or affect the same by way of sale, mortgage, charge, or otherwise, in the way of anticipation; and in default of such direction or appointment, to pay the same to the said *Emma Elizabeth Warren* for her separate use without power of anticipation, her receipts alone to be sufficient discharges; and after the death of the said *Emma Elizabeth Warren*, in case the said *Arthur Mainwaring* should survive her, to pay the said income to him during his life; and after the death of the survivor the said trust funds and the income thereof were directed to be held in trust for the children of the marriage, as they jointly by deed, or as the survivor by deed or will, should appoint, and in default, for all the said children who, being sons, should attain the age of twenty-one years, or die under that age leaving issue, or being daughters should attain that age or marry; and if there should be no child or children or issue of the marriage who should attain a vested interest in the said trust funds, the same should be held in trust for the said *Emma Elizabeth Warren* if she should survive the said *Arthur Mainwaring;* but if she should die in his lifetime, then in trust for such persons as she should by deed or will appoint; and in default, in trust for such persons as, at her decease, would have been her next of kin under the Statutes of Distribution, in case she had died intestate and unmarried.

The indenture also contained a covenant in the words and figures following: "And the said *Arthur Mainwaring* doth hereby for himself, his heirs, executors, and administrators, covenant, promise and agree, with and to the said *Richard Pelham Warren, Henry Warren,* and *William Fletcher Boughey,* their executors, administrators, and assigns, in manner following, that is to say, that in case the said intended marriage shall take effect, and at any time during the joint lives of the said *Arthur Mainwaring* and *Emma Elizabeth*

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Warren, any real or personal estate whatsoever shall, by descent, transmission, devise, gift, donation, representation, or otherwise, descend to, devolve upon, or vest in the said *Emma Elizabeth Warren*, or the said *Arthur Mainwaring* in her right, for any estate or interest whatsoever, then and in such case, and as often as the same shall happen, he, the said *Arthur Mainwaring*, shall and will immediately thereupon make, do, and execute, or cause and procure to be made, done, and executed, and join and concur in making, doing, and executing, all such conveyances, assignments, surrenders, assurances, acts, deeds, matters, and things whatsoever, as will effectually vest the same respectively, and every part and parcel thereof, in the said *Richard Pelham Warren*, *Henry Warren*, and *William Fletcher Boughey*, their heirs, executors, administrators, and assigns respectively, according to the nature and tenure thereof respectively, upon the same trusts, and for the same intents and purposes, and under and subject to the same powers, provisoes, and agreements, as are hereinbefore expressed and declared concerning the said trust moneys, stocks, funds, and securities respectively, hereby settled and assured, or intended so to be, or such of the said trusts, intents and purposes, powers, provisoes and agreements, as shall then be subsisting and capable of being executed, or as near thereto as the nature of the property and other circumstances will admit of; and that until the said property and effects shall be so settled and assured as aforesaid, the same shall be subject to such trusts, powers, provisoes, and agreements as aforesaid, and shall be held and enjoyed accordingly."

There had been no issue of the marriage.

Mrs. *Penelope Warren*, widow, by her will dated the 24th of December, 1860, made the following bequest: "I bequeath to my four daughters" (of whom Mrs. *Mainwaring* was one) "£2700 sterling each;" and appointed her son, the said *Richard Pelham Warren*, and *Robert Henry Jones*, her executors.

By a codicil dated the 5th of June, 1863, Mrs. *Penelope Warren* directed as follows: "I desire that all sum and sums of money which by my will are given to my daughter *Emma Elizabeth Mainwaring*, shall be paid over by my executors to the trustees of her

marriage settlement, bearing date the 11th day of July, 1843, to be held by them upon the trusts of the said settlement, and that no part thereof, except the interest of the same, be paid to the said *Emma Elizabeth Mainwaring*, or to her husband, Captain *Arthur Mainwaring*, during their joint lives; and I desire that the same principal moneys, and every part thereof, be forthwith settled and assured by the said *Arthur Mainwaring* in pursuance of the covenant for that purpose contained in the said marriage settlement."

By another codicil, undated, Mrs. *Warren* directed as follows: "I hereby authorize my executors, before paying over the principal moneys given by me to the said *Emma Elizabeth Mainwaring* to the trustees of her marriage settlement as hereinbefore directed, to pay such part of the same to the said *Emma Elizabeth Mainwaring* as she may require for her separate use independent of her said husband, and to be free in all respects from his debts, control, and engagements."

Mrs. *Warren* died on the 22nd of November 1865, and her will and codicils were duly proved by *Richard Pelham Warren* alone, on the 7th of February, 1866.

On the 7th of February, 1866, *Richard Pelham Warren*, as such executor as aforesaid, appropriated out of the personal estate of the testatrix, to answer the said legacy of £2,700 (less legacy duty of £27) the sum of £3085 14*s.* 3*d.* consols. After such appropriation had been made, but before any part of the said sums had been transferred or paid to the trustees of the settlement, Mrs. *Mainwaring* required that £2308 16*s.*, part of the said sum of consols, should be sold, and the proceeds paid to her for her separate use. *Richard P. Warren* being, as he admitted, desirous of making such sale and payment, had transferred into Court £2308 16*s.* consols, and at the same time he filed an affidavit, stating that he was advised it was doubtful whether the whole of the £3085 14*s.* 3*d.* consols ought not to be transferred into the names of himself, *Henry Warren*, and *William Fletcher Boughey*, as trustees.

This Petition was presented by Mrs. *Mainwaring*, praying that the said sum of £2308 16*s.* consols might be sold, and the residue of the proceeds, after payment of costs, paid to the Petitioner for her separate use upon her separate receipt.

V.-C. W.

1866

In re MAINWARING'S SETTLEMENT.

Mr. *Little*, for the Petitioner :—

The testatrix did not intend that the legacy of £2,700 should be operated upon by the settlement, and her intention must prevail: *Douglas* v. *Congreve* (1).

It will be argued that Miss *Warren's* assignment of future property extends to this legacy; but if so, of what use was the insertion of a covenant by Captain *Mainwaring* to settle after-acquired property? If her whole interest was bound by the antenuptial contract, there would have been nothing left for Captain *Mainwaring's* covenant to operate upon. That cannot be the true construction of the settlement. The meaning is, that Miss *Warren's* assignment covered all property in possession or in reversion, whether vested or contingent, at the date of the deed, and amounted to a covenant to settle all property that might fall in afterwards before the actual celebration of the marriage, but no other property. The intended wife assigned and covenanted to assign everything up to the date of the marriage, and the intended husband covenants for everything that may fall in afterwards. If general words in the operative part of a settlement are followed by a clause inconsistent with the generality of its terms, the former operative portion will be restricted: *Re Stephenson's Trusts* (2).

But further, property which is given to a wife for her separate use is not bound by the husband's covenant to settle after-acquired property: *Douglas* v. *Congreve* (3); *Travers* v. *Travers* (4); *Ramsden* v. *Smith* (5); *Grey* v. *Stuart* (6). Therefore it is clear that upon the husband's covenant alone it is impossible to hold that this fund was bound.

Another view of the case is this. The assignment must be construed, not merely with regard to its operation upon after-acquired property in general, but with reference to its operation upon this property, having regard to the terms of this particular gift. Upon that principle a life interest has been held not to be within a covenant of this sort. Originally this fund was not given to the devisee for her separate use. But by her first codicil the testatrix makes the trustees of the settlement the direct donees of the

(1) 1 Keen, 410, 423.
(2) 3 D. M. & G. 969, 974.
(3) 1 Keen, 423.
(4) 2 Beav. 179.
(5) 2 Drew. 298.
(6) 2 Giff. 398.

fund, and she desires that no part thereof, except interest, shall be paid to the wife or the husband during their joint lives; shewing that up to this time she had before her the fact of the marriage settlement. She then directs that the legacy should be settled by the husband. Then comes the second codicil. To contend that any fund which comes within the purview of the second codicil, and which has passed into the hands of the wife, is to be handed back to the trustees of the settlement, would be to destroy the whole scope of the bequest. That construction would be so manifestly inconsistent, that the Court could never uphold it under any circumstances. Suppose the house and furniture were settled in express terms, could it be said that they came within the scope of the assignment? *Thornton* v. *Bright* (1).

Mr. *F. Bacon* appeared for the husband; but the Vice-Chancellor said that he could not be heard.

Mr. *Wolstenholme,* for the trustees of the settlement:—

It is insisted that the gift in the will and codicils is inconsistent with the terms of the settlement. But it is an answer to that to say, that the persons taking under this settlement (amongst whom may possibly be children) do not claim under the will at all; they claim under the contract of the wife, made when she was a *feme sole,* that everything coming to her should be dealt with in a certain manner.

How does this obligation differ from an ordinary debt? Suppose she had contracted that if she ever received certain moneys she would apply them in payment of certain specific debts, would she have been released from her obligation because, by the terms of the instrument under which she was paid, it was agreed that the moneys should never be applied in payment of those debts? Property cannot be given absolutely to a person, and at the same time be freed from that person's obligations. The trustees say: "We insist that every fund coming to your hands from any quarter shall be delivered over to us."

The VICE-CHANCELLOR:—Suppose the testatrix had said in so many words: "I am aware of my daughter's settlement, and I

(1) 2 My. & Cr. 230, 234, 255.

V.-C. W. 1866 *In re* MAINWARING'S SETTLEMENT.

will not therefore hand over to her any property to be bound by her settlement, but I will give her a legacy which is not to be so bound," would she forfeit the legacy?

Mr. *Wolstenholme*:—I submit so. The only way by which a contract of this sort could be avoided would be, by creating a fund to answer the claims of the trustees. The testatrix might have left one moiety to answer these trusts, and have given the other to the married woman absolutely.

Every sum of money which comes to the married woman absolutely must be bound by her covenant; and it is inconsistent with an absolute interest in her that she should not be able to contract with respect to it.

The fund ought therefore to be paid to the trustees of the settlement, not to the lady herself.

SIR W. PAGE WOOD, V.C.:—

This case is one of very peculiar character, and I am much obliged by the argument that has been addressed to me on behalf of the possible children of the marriage.

The question is whether upon a certain class of authorities, regard being had to the peculiar language of the gift, this legacy can be brought within the meaning and scope of the settlement. The deed, no doubt, is singularly expressed; but it certainly is so worded as to bind all property whatsoever that may be coming to the authoress of the trusts. She first recites that she has certain property in possession, and certain other property in expectancy; and then she assigns all the property she has referred to by recitals, and all other the personal estate to which she is entitled in possession or reversion, and then she covenants to settle "any property to which she may at any time hereafter become entitled in any way howsoever" upon the trusts of the settlement, which are, for herself for life for her separate use during the coverture, then for her husband for life, and then for the children, and in default of children for the wife absolutely, or for her next of kin exclusive of her husband.

Now, in the case of *Re Stephenson's Trusts* (1), where there were

(1) 3 D. M. & G. 969.

words of assignment quite as wide as those which occur here, it was held that whilst such words, standing alone, would have passed all the wife's future property, yet they could not be held to have that operation when followed by another witnessing part containing a covenant by the husband to settle after-acquired property, *in such manner as that the wife might have the sole power of disposition over the same* notwithstanding her coverture. As Lord Justice *Turner* observed (1), if any other construction could be maintained, the effect of the assignment would be such that there could be no property to which the subsequent covenant could apply. Hence the former operative part was held to be restricted by the latter.

But there is nothing of the kind here. The husband's covenant, which extends to "any real or personal estate whatsoever" which shall descend to, devolve upon, or vest in, the wife, or in the husband in her right, is to convey such property *upon the trusts of the settlement;* and hence there is no inconsistency between the husband's covenant and the assignment by the wife, which amounts simply to a contract on her part.

Therefore, on the ground of the settlement alone, I should have felt very great difficulty.

But although the limitations in the will and codicils are also very peculiar, as to the intention of the testatrix there cannot be a doubt. She first gives a legacy of £2700 absolutely to her daughter. Then, by her first codicil, she takes notice of the marriage settlement, for she desires that the legacy shall be paid to the trustees; that no part of the capital shall be paid to either husband or wife during their joint lives; and that the same shall be forthwith settled by the husband in pursuance of his covenant. She therefore takes notice of the very special provisions of the settlement itself. Then she makes a second codicil, whereby she authorizes her executors before paying over to the trustees the principal moneys given by her to her daughter, to pay such part of the same to her said daughter as she might require "for her separate use, independent of her husband, and to be free in all respects from his debts, control, and engagements." She therefore means to say, "I do not intend this portion of my daughter's

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(1) 3 D. M. & G. 975.

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property to be comprised in her settlement; I intend that she shall take it upon this express condition, that it shall not be settled."

The question is, whether the Court ought to consider such a gift as this to be comprised in the covenant to settle after-acquired property. Now, in the first place, the Court will not hold property as comprised in the covenant which will not fit the trusts of the settlement. On this ground it has been held that estates for life and annuities are not within the scope of such a covenant.

Again, in the case of *Thornton* v. *Bright* (1), although it was not a case of a covenant by an intended wife, what was said by Lord *Cottenham* is extremely appropriate. The result of his Lordship's reasoning is this—"You must see what is the nature of the gift, and if you find the gift to be of a nature with which the terms of the covenant itself are not consistent, you do not bring in the covenant, or apply it to property given in that way." If I am asked to apply the covenant in this instance to this property, I must hold that it does not fall within the scope of this settlement, and that it must be handed over to the wife.

I think the argument founded on the words "free from his debts, control, and engagements," is quite unanswerable. One of the engagements by which the property would, but for this codicil, have been bound, was, that it should be included in the description of after-acquired property within the meaning of this covenant.

Therefore I think I am justified in ordering payment to this lady of the sum of £2000, subject to the payment of the costs of the Petition.

Solicitors for all parties: Messrs. *Domville, Lawrence, & Graham.*

(1) 2 My. & Cr. 230, 255.

DIXON *v.* FRASER.

V.-C. W.
1866
June 21.

Exception—Specific Performance—Discovery—Account of Intermediate Dealings.

A bill for specific performance of a contract to sell to the Plaintiff certain premises and machinery, alleged that Defendants, the vendors, had since the date of the contract let the premises to third parties, and the Defendants were required by the interrogatories to set out the names of such persons, the particulars of the selling, and an account of the rents of the premises, and also to state whether the plant was not being deteriorated by the user thereof by the Defendants' tenants.

The Defendants having refused to give the discovery sought by the interrogatory:—

Held, on exception to the answer for insufficiency, that the Plaintiff was entitled to know to whom the property had been let, and for what term.

EXCEPTION to answer.

Bill for specific performance of a contract by Defendants to sell an oil mill, with the plant and machinery, to the Plaintiff. The memorandum of agreement (dated the 14th of March, 1865), fixed the 13th of May as the time for completion of the purchase, but provided that the purchaser should be at liberty to enter upon the premises for all purposes of use, except alteration and removing of the plant and machinery, immediately after signing the contract; notwithstanding this proviso the Plaintiff had been unable to obtain possession, and the contract, from various difficulties that had arisen, still remained uncompleted.

The bill, which was filed for specific performance of the agreement, alleged that the Defendants had never furnished the Plaintiff with a complete abstract, or made out their title to the premises, and it was alleged by way of amendment, that the Defendants had let the premises to other persons at £40 a month, and that they ought to account to the Plaintiff for the rents and profits thereof at that rate, at least from the 14th of March, 1865; and that the plant was daily being deteriorated and worn out by the improper user thereof by the tenants of the Defendants.

The amended bill, in addition to relief by specific performance,

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prayed an account of rents and profits of the premises from the 14th of March, 1865.

The third interrogatory to the amended bill asked, whether the Defendants had not let the premises to certain persons, and allowed them to use the machinery? and it called upon the Defendants to set forth the particulars of such letting, and an account of all moneys received by them, or on their behalf, in respect of the rents, issues, or profits of the said premises, or any part thereof, since the 14th of March, 1865. The interrogatory also asked, whether the plant was not daily being deteriorated in value and worn out by the user by the tenants of the Defendants.

The Defendants answered this interrogatory as follows:—

"We have not entered into any other contract or engagement which will have the effect of preventing us from delivering up possession of the premises to the Plaintiff, if this honourable Court shall decide that he is entitled thereto; and moreover, before we entered into any contract or engagement whatever affecting the premises, the Plaintiff had registered this suit as a *lis pendens*, so that no contract which we could enter into could in any manner affect his rights in relation thereto; and we submit that the Plaintiff is not entitled to any further answer to the third interrogatory to the amended bill, and we respectfully decline to gratify his curiosity by setting out the particulars inquired after by that interrogatory."

To this answer the Plaintiff excepted for insufficiency.

Mr. *Davey*, in support of the exception, contended that the Plaintiff was entitled to discovery upon every part of his case that was properly pleaded, and that it was essential for him to know who was in possession of the premises, and on what terms. The bill and answer should form a record upon which a complete decree could be made, and he ought to get from the Defendants such an answer as would entitle him (assuming him to establish his right to specific performance and an account of intermediate rents) to take, if he preferred it, an immediate decree for payment of the sum admitted by the answer, without taking the account: *Rowe* v. *Teed* (1); *Robson* v. *Flight* (2).

(1) 15 Ves. 376, 378.

(2) 3 N. R. 183.

Mr. *A. E. Miller*, for the Defendants:—

The interrogatory is a mere fishing interrogatory, and has nothing whatever to do with the question at issue between the parties, which is, whether or not the contract has been rescinded. That is the sole question for trial, and it is an elementary principle that the "right of a Plaintiff to discovery is in all cases confined to the questions in the cause which, according to the pleadings and practice of the Courts, are about to come on for trial (1)."

[The VICE CHANCELLOR:—Assuming that the Plaintiff establishes his right to specific performance, the decree will go on to direct an account of intermediate rents.]

That may be, but the information required is on a merely subordinate point, and is unnecessary for the purposes of the hearing; and following *Swabey* v. *Sutton* (2), and *Lett* v. *Parry* (3), even though the Plaintiff may shew a *primâ facie* right to the account of intermediate rents, the Court will not compel discovery when the result of the discovery cannot affect the question to be decided at the hearing. In the cases cited on the other side, the Plaintiff was in any view of the case entitled to some interest in the property. [He also cited *Daw* v. *Eley* (4).]

SIR W. PAGE WOOD, V.C.:—

The exception must be allowed. The allegation of a contract between the parties is not denied, and I must assume, as against the Defendants, the possibility of the contract being established. It then becomes a very grave question for the purchaser, who may suffer from any damage resulting from a deterioration of the plant, to know who the persons in possession and using the machinery and plant are, and what is the nature and extent of their interest.

It may be a question whether the Plaintiff may not prefer to introduce them as parties to the suit by amendment, and therefore he is entitled to know who they are, the extent and duration of their interests, and generally, what sort of claims will be set up against him by them. As to an account of rents, some difficulty, no doubt,

(1) Wigram on Discovery, Prop. i.
(2) 1 H. & M. 514.
(3) 1 H. & M. 517.
(4) 2 H. & M. 725.

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arises from a conflict of decisions as to the right to an account of this description, which must require time and trouble, and whether it may not be better that any account of intermediate rents should stand over until the hearing.

There is great force, however, in the observations of Lord *Eldon*, in *Rowe* v. *Teed* (1) and of the Master of the Rolls in *Robson* v. *Flight* (2). I hold that the simple question, to whom the property has been let and for what term, is one that ought to be answered, and the matter of the rents is really so small that I can make no distinction, but allow the whole of the exception; and as it seems to be now settled that unless some direction be given the simple allowance does not carry costs, I allow it with costs.

Solicitors: Mr. *J. W. Nicholson;* Messrs. *Lowless, Nelson, & Goodman.*

(1) 15 Ves. 378. (2) 3 N. R. 183.

BLYTH *v.* CARPENTER.

V.-C. K.
1866
August 1.

Stock Mortgage—Redemption—Amount to be replaced.

On a stock mortgage for a term of years for securing the purchase of stock at the end of the term, and securing payment in the meantime of interest calculated on the proceeds of the stock sold for the mortgage, the mortgage having been suffered by the mortgagee to continue after the term, and the price of the stock having fallen :—

Held, that in a redemption suit the mortgagee was not entitled to the market value of the stock at the end of the term ; but that the mortgagor was entitled to redeem on purchasing the stock, and paying interest to the time of purchase, and costs.

THIS was a Petition in the above mentioned suit of *Blyth* v. *Carpenter*, and in another suit of *The Official Manager of the Warwick and Worcester Railway Company* v. *Carpenter*. The latter suit related to the subject-matter of the former, and was to some extent in the nature of a supplemental suit. The object of the Petition was to settle the suits upon certain terms.

By consent, the hearing of the Petition was to be treated as the hearing of a suit for the redemption of certain mortgage securities which constituted a species of stock mortgage for a term of years. The only question submitted to the Court was, as to the amount to be replaced, the stock having fallen in value since the end of the term for which the mortgage was made, and the mortgage having been suffered by the mortgagees to continue since the end of the term. The securities were in similar terms, the principal one being an indenture of mortgage dated the 28th of July 1856, which after reciting that on the 29th of January, 1856, *Jane Carpenter*, *R. Atkins*, and *W. Carpenter*, sold £2,250 New £3 per Cent Bank Annuities, and £1,012, £3 per Cent. Consolidated Bank Annuities, standing in their names and belonging to them jointly, and that the net proceeds of such sale, amounting to £3000, were, on the 31st of January, 1856, paid to *George Carpenter*, or applied for purposes directed by him : It was witnessed that in consideration of £3000 so paid as aforesaid, the said *George Carpenter* and *Amelia Carpenter* covenanted with the said *Jane Carpenter*, *R. Atkins*, and

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W. Carpenter, that the covenantors, their heirs, executors, or administrators, or some or one of them, would on the 31st of January, 1862, purchase or transfer the sums of £2,250, New £3 per Cent. Bank Annuities, and £1012 £3 per Cent. Consolidated Bank Annuities, into the names of the said *Jane Carpenter*, *R. Atkins*, and *W. Carpenter*, or the survivors or survivor of them, or the executors or administrators of such survivor, or their, her, or his assigns, and would in the meantime, and until such purchase or transfer of the said capital sums, pay to the said *Jane Carpenter*, *R. Atkins*, and *W. Carpenter*, and the survivors and survivor of them, and the executors or administrators of such survivor, and their, his, or her assigns, interest after the rate of £5 per cent. per annum on the said sum of £3000, by equal half yearly portions, on the 31st of July and 31st of January in every year, and would make such purchases, or transfers and payments as aforesaid, without any deduction.

The mortgage contained a proviso for redemption of the mortgaged property, if the said *George Carpenter* and *Amelia Carpenter*, their heirs, executors, and administrators, or some or one of them, should well and truly purchase, or transfer into the names or name of the said *Jane Carpenter*, *R. Atkins*, and *W. Carpenter*, or the survivors or survivor of them, or the executors or administrators of such survivor, or their, his, or her assigns, the said capital sums of stock thereinbefore covenanted to be purchased or transferred on or at the day or time thereinbefore mentioned and appointed for the purchase or transfer of the same, and also should in the meantime, and until purchase or transfer of such capital sums, pay or cause to be paid to them or him interest on the said sum of £3000, at the rate, and at the times, and in manner aforesaid, and should in the meantime duly observe and perform the several covenants, provisoes, and agreements, therein contained on the part of them, and each of them, the said *George Carpenter* and *Amelia Carpenter*, their and each of their heirs, executors, and administrators.

The mortgage also contained a power of sale, which was exercisable in case default should be made in the purchase or transfer of the sums of stock secured thereby, or in payment of the interest upon the sum of £3000 for three months, after the same should have become due, or in performing any of the covenants, provisoes,

and agreements therein contained, under which the proceeds of sale were applicable in the first place in payment or discharge of the costs, charges, and expenses sustained in exercise of the power of sale and incidental thereto, and in paying all arrears of interest secured thereby, and in the next place in the purchase of the capital sums of £2,250, New £3 per Cent. Bank Annuities, and £1,012 £3 per Cent. Consolidated Bank Annuities, and the residue was to be paid to the mortgagors.

The mortgage was not discharged on the 31st of January, 1862. In September, 1857, the interest being in arrear, the mortgagees entered into possession and receipt of the rents and profits of part of the mortgaged property, and thenceforward to the present time had remained in such possession and receipt. They had been paid, or had retained, interest on the £3,000 as upon a continuing mortgage, and had not sued upon the covenant, or proceeded to foreclose the mortgage.

Mr. *Glasse*, Q.C., and Mr. *Fry*, for the Petitioner, the official manager, took no part in the argument.

Mr. *Marten*, for the mortgagees :—

The question is, whether the mortgagees, on being redeemed, are entitled to the market value of the stock on the 31st of January, 1862. The price of consols was then $92\frac{3}{4}$ to $92\frac{7}{8}$, and of New £3 per cents. $92\frac{5}{8}$ to $92\frac{3}{4}$, being considerably above their present prices. The mortgagees desire to have the market value on the 31st of January, 1862, the day on which the purchase should have been made. The proviso for redemption refers to the covenant, and the question is, what would be, at law, the measure of damages for breach of the covenant. It is clear that in an action on the covenant the Plaintiff would recover not less than the market value of the stock at the time appointed by the covenant for the transfer; though he might have the option of taking the stock if its value had risen instead of fallen. The right to the value at the time when the transfer ought to have been made was established in *Forrest* v. *Elwes* (1), where there was a transfer of stock by way of loan upon bond, with a condition to replace the

(1) 4 Ves. 492.

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stock six months after the date, and in the meantime to pay interest at £5 per cent., and the stock not being replaced and being depreciated, the obligee was held entitled to the value of the stock at the time fixed for the transfer. In *M'Arthur* v. *Seaforth* (1), the rule, as stated in the marginal note, was as follows:— "On a failure to replace the stock, the measure of damages is the price at the day when it ought to have been replaced, or the price at the day of the trial, at the option of the Plaintiff."

There is no equitable ground for cutting down the amount which might be recovered at law. The trusts of the proceeds of a sale under the power do not affect the question. The power was exercisable at the mortgagees' option and they might have waited until stocks were higher. The question is, what are they to be compelled to accept upon a forced redemption? There has been no waiver of the mortgagees' right. There can be no such waiver while the covenant is legally enforceable. The mortgagees are at liberty to rely on their covenant and security, and ought not to be prejudiced because they did not compel a transfer immediately upon default.

Mr. *Archibald Smith*, for the mortgagors:—

This is the usual form of a stock mortgage where the interest is to be paid upon a fixed sum. Before the abolition of the usury laws there might have been a question as to the validity of such a mortgage, but now it is perfectly valid. The interest payable is at £5 per cent. upon the cash advanced, and so far it is a money mortgage, but inasmuch as the stock is to be replaced it is a stock mortgage *quoad* the principal. The money was not paid on the day named, and by mutual consent the transaction was allowed to go on, and the mortgage to exist, but it was continued upon the original terms: that is, the replacement of the specific sums of stock whenever the mortgage should be paid off. The only object of such a mortgage is to save the mortgagee from risk in case of a fall in the value of the stock, and all he can require is to have the stock replaced. The case of *Forrest* v. *Elwes* (2) was a debt secured by bond and not by mortgage, and therefore it does not apply here: *Coote* on Mortgages (3); *Powell* on Mortgages (4).

(1) 2 Taunt. 257. (2) 4 Ves. 492. (3) Page 357. (4) Page 1066.

Mr. *Marten* in reply :—

The mortgagors shew no ground for disputing my first proposition, viz.: that in an action on the covenant, the mortgagees would recover the full amount claimed; therefore, either the claim must be objectionable in equity, on grounds upon which mortgages are held to be redeemable, and the penalties of bonds reduced; or it must be held that the claim is barred on a special equitable ground of laches or acquiescence. The cases of *Forrest* v. *Elwes*, and *M'Arthur* v. *Seaforth*, shew that there is no general principle of equity upon which the legal effect of the covenant will be cut down. Those were cases of bonds in which the principle of equity was applied to cut down the penalty to what was due according to the condition: but there is no principle of equity by which the condition would itself be cut down as proposed. So in the case of a mortgagor, equity allows the mortgagor to redeem, but the terms of redemption must be measured by what could be recovered at law, upon the covenant. *Forrest* v. *Elwes* was not decided on the usury laws, and in fact is distinguished in *Barnard* v. *Young* (1) from cases affected by those laws. As to a special ground of equity by waiver or laches, at what point of time is the waiver to be fixed? the receipt of the interest ought not to affect the rights as to the principal. The inference, if any, from the receipt of interest on the £3000, would be, that the parties had agreed to treat the mortgage as a mortgage for that principal sum, which would be less than the value claimed, but more than the present value of the stock. At all events, therefore, the mortgagees should have the £3000.

Mr. *Fischer*, for other parties, took no part in the argument.

SIR R. T. KINDERSLEY, V.C. :—

By the agreement of the parties the Court is to deal with this case on the same footing as if a bill had been filed to redeem the mortgage. The mortgage was of this nature: The mortgagees being asked to lend £3000, agreed to do so for six years, on the terms of being paid £5 per cent. interest on the £3000 during

(1) 17 Ves. 44.

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that time, but as they did not like to take the risk of the fluctuation in the price of the funds, they stipulated that, instead of being paid the £3000 at the end of the six years, they should have the same amount of stock transferred into their names as they sold out to raise the £3000. It may be considered as a stock mortgage, *quoad* the principal, but a money mortgage, *quoad* the interest. Such a transaction is perfectly legal since the abolition of the usury laws. The time fixed for the re-transfer of the stock, was the 31st of January, 1862; and by the mortgage deed, the mortgagor covenanted for the transfer on that day into the names of the mortgagees of the amount of stock which they had sold out to raise the £3000, and for the payment of five per cent. interest on the £3000 in the meantime. Then follows the proviso for redemption on the terms of the covenant being duly fulfilled; and that is followed by a power of sale in case the terms of the covenant should not be fulfilled.

It is contended on the part of the mortgagees, that if they were now to bring an action at law on the covenant, they would recover by way of damages the market price of the stock on the 31st of January 1862, which was more than the present market price. Without stopping to question this proposition, and assuming that such would be the remedy in an action at law, the question is, how the matter is to be regarded in a Court of equity.

The intention of the parties throughout clearly was, that it should be a stock mortgage, *quoad* the principal, provided that as long as it lasted, interest should be paid as on a money mortgage. When the time came for replacing the stock which was stipulated for by the mortgage deed, the parties, by a tacit agreement, allowed the mortgage to continue; but the effect of that was not to turn the stock mortgage into a money mortgage, but only to postpone indefinitely the period for the redemption of the mortgage, the mortgagor still continuing to pay the same interest upon the same amount of principal. In effect, the mortgagee waived the obligation to transfer the stock at the particular time fixed by the mortgage deed, but in all other respects the terms remained the same as before. Indeed, that the parties did not intend that the non-transfer of the stock on the day fixed should give to the mortgagees the option of requiring payment of the market price of the

stock on that day is apparent from the terms of the power of sale. If the mortgagees had sold after the time fixed for the re-transfer had elapsed, the proceeds of the sale must have been applied only in replacing the original amount of stock, and there would have been no right in the mortgagees to retain the market price of the stock on the 31st of January, 1862.

I am of opinion that the mortgagor is only bound to transfer the original amount of stock—that is to say, the two sums of £2250, New £3 per Cent. Annuities, and £1012, £3 per Cent. Annuities.

Solicitors for the Official Manager: Messrs. *J. & W. Galsworthy.*

Solicitor for the Mortgagees: Mr. *S. J. Robinson.*

Solicitors for the Mortgagors: Messrs. *Howard, Dollman, & Lowther.*

RUSSELL *v.* HARFORD.

Contract for Sale—Specific Performance—Conditions of Sale—Easement—Rights of Way and Water.

A. and *B.* were tenants of adjoining premises, under the same landlord. *A.* had a well upon his premises, from which *B.*'s premises were supplied with water by means of a pipe. Both premises, with others, were put up for sale by auction, in lots, one of the conditions being that each lot was subject to all rights of way and water and other easements (if any) subsisting thereon. *A.* and *B.* both purchased the lots of which they had been tenants. The vendor insisted that *A.* had purchased subject to *B.*'s right of water. *A.* filed a bill for specific performance of the contract, without any liability to such easement:—

Held, that *B.* had no easement or right of water, but merely a license from his landlord during his tenancy; and that *A.* was entitled to the relief asked.

6 Ch. 178
12 Ch D 34

IN October, 1865, the Defendant put up certain premises for sale by auction, in lots, and the Plaintiff, *W. Russell*, became the purchaser of Lots 4 and 6. These lots were sold together, and before Lot 5, which was purchased by *J. Mackrell*. The Plaintiff had been a tenant of the Defendant for many years, in respect of the lots so purchased by him, and *J. Mackrell* had also been a tenant of the Defendant,

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in respect of Lot 5. The Plaintiff bought the property with a view to building larger premises thereon, and for the purpose of carrying on the business of a maltster and brewer. *J. Wood* was the agent and solicitor acting for the Plaintiff at the sale. The Plaintiff made no objection to the title, and the draft conveyance was prepared by his solicitor and sent to the Defendant's solicitor, who approved of the same. The deed of conveyance was then engrossed, and forwarded to the Defendant's solicitor for execution. After some delay the engrossment was returned, and the Defendant then insisted, for the first time, that it ought to contain a reservation in the terms following: "Subject to the right of *J. Mackrell*, his heirs and assigns, as owner of the adjoining premises, to the joint use of a well of water situate on the premises of the said *W. Russell*, from which the pump in the premises of *J. Mackrell* is supplied, by a pipe laid on to the said well; and the right of entry for the said *J. Mackrell*, his heirs and assigns, on the premises of *W. Russell*, for the repair and renewal of the said well and pipe, as occasion may require."

J. Mackrell, during his tenancy of Lot 5, so purchased by him as aforesaid, had been supplied with water by means of a pipe communicating with a well situate on the premises included in Lot 6; and he alleged that at the time of the sale of Lot 5, his solicitor and agent, Mr. *Bigg*, stated aloud that the house and premises, Lot 5, was supplied with water by a pipe from a well on the adjoining premises, distinguished as Lot 6, and asked the auctioneer whether the supply of water would be continued, and the said Mr. *Bigg* was informed in reply, that the lot would be sold with the easements then existing thereon, and he referred to the 10th condition of sale.

The Plaintiff objected to the reservation of any right of way or water on the part of *J. Mackrell* upon the premises so purchased by him; but the Defendant's solicitor insisted upon the clause, and stated that if the Plaintiff declined to purchase subject to the easement, he would fail to comply with the conditions of sale, and would, under the 12th condition, be liable to forfeit his deposit.

After some further correspondence, the Defendant proceeded to act upon the 12th condition, and advertised the premises comprised in Lots 4 and 6 for sale.

The 10th condition was in the following terms: "Each lot is believed, and shall be taken, to be correctly described as to quantity and otherwise, and is sold subject to the payments mentioned in the particular, and to all chief rents and other rents, rights of way and water, and other easements (if any) charged or subsisting thereon." And the 12th condition provided that if any purchaser should fail to comply with the conditions his deposit should thereupon be forfeited to the vendor, who should be at liberty to re-sell the property.

The Plaintiff alleged that the communication established by means of the before-mentioned pipe between Lots 5 and 6 was simply an arrangement made by the Defendant, as the landlord of both houses, and by such user *J. Mackrell*, being only a yearly tenant, had acquired no right or easement in respect thereof against his landlord or any purchaser from him. The question was one of great importance to the Plaintiff, inasmuch as it would give *J. Mackrell* a right of entry in perpetuity upon the Plaintiff's property, and such right would prevent him from building upon or enlarging the premises as he had contemplated.

The bill prayed specific performance of the contract, and an injunction to restrain the Defendant from re-selling the premises.

Affidavits were read on both sides as to what took place at the auction, but the result has been sufficiently stated.

Mr. *Baily*, Q.C., and Mr. *Millar*, for the Plaintiff:—

The evidence as to what took place at the auction only brings it to this, that the auctioneer referred to the conditions of sale, and upon them the case must be decided. The 10th condition is a mere common form, having no special reference to the lot about to be sold. If it had been intended to include such a right as this, it would have been specifically set forth. Mr. *Mackrell* was only a tenant from year to year, and his tenancy could, therefore, have been terminated at any time by six months' notice. The right to water which he had enjoyed during his tenancy was no easement whatever which he could enforce. It was a mere license from his landlord; and the 10th condition of sale could have no effect as between the purchasers of different lots. It is clear that the

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vendor himself had no intention of reserving any right upon Lot 6, as the conveyance was actually approved of by his solicitor without any such reservation.

In *Daniel* v. *Anderson* (1), where one tenant had acquired a right of way against another tenant under the same landlord, and the landlord sold both tenements under a general condition that they were sold subject to, and with the benefit of, all subsisting rights of way, it was held that the purchaser of the first tenement had no right of way as against the purchaser of the other; and in *Suffield* v. *Brown* (2) it was decided by the Lord Chancellor, overruling a decision of the Master of the Rolls, that if the owner of two adjoining tenements conveys one of them to a purchaser absolutely, the tenement so sold is discharged from any quasi-servitudes to which it was subjected by the vendor during his ownership of both properties; and the purchaser is not bound to take notice of the manner in which the tenement purchased has been used for the convenience of the adjoining tenement. If Mr. *Mackrell* thinks he has any claim against the vendor for compensation, he can file his bill for compensation, as was done in *Fewster* v. *Turner* (3).

Mr. *Glasse*, Q.C., and Mr. *Cooke*, for the Defendant:—

The Plaintiff knew of the right which the occupier of Lot 5 had enjoyed in respect of his premises for several years, and when the question was asked of the auctioneer whether that right was to be continued, the Plaintiff, or his agent, must have known to what it referred. The answer of the auctioneer, saying that the lot would be sold with the easements existing thereon, and referring to the 10th condition of sale, was sufficient notice to the Plaintiff that this particular right of water was reserved. By the Plaintiff raising no objection at the sale to what the auctioneer had stated, it would lead naturally to the inference that he acquiesced in the statement; and it was upon the understanding that the water would be reserved, that Mr. *Mackrell* became the purchaser of Lot 5: *Freeman* v. *Cooke* (4); *Cornish* v. *Abington* (5). The 10th condition of sale clearly reserves all rights of way

(1) 31 L. J. (Ch.) 610.
(2) 33 L. J. (Ch.) 249.
(3) 11 L. J. (Ch.) 161; 6 Jur. 144.
(4) 2 Ex. 654.
(5) 4 H. & N. 549.

and water, and this right comes within that condition. If the Plaintiff misunderstood the question, and supposed that the right was not reserved, then it would come under the definition of a substantial error; and if he insists on the objection, and the vendor is unwilling or unable to remove or comply with the objection, then he is at liberty to annul the sale under the 5th condition. In the case of *Suffield* v. *Brown*, the Lord Chancellor expressly said that a grantor could not derogate from an absolute grant which he has made. That case has no application to the present, for there was no reservation of an easement, and no user as a matter of right; and the adjoining tenement could be used perfectly well without the easement; but here the premises comprised in Lot 5 would be rendered useless without the right of water. The case of *Fewster* v. *Turner* does not apply, as this is not a case in which the purchaser of Lot 5 could file a bill for specific performance. *Wardle* v. *Brocklehurst* (1) very much resembles this case. There the owner of two farms, *A.* and *B.*, conveyed farm *B.* to the Defendant, together with all waters and watercourses appertaining to the premises. He afterwards conveyed farm *A.* to the Plaintiff, with all waters and watercourses; and it was held that, as against the owner of farm *A.*, the words of the conveyance of farm *B.* were sufficient to convey to the Defendant the right in the continuance of a culvert, and the accustomed flow of water from it.

Mr. *Baily*, in reply.

SIR R. T. KINDERSLEY, V.C., after stating the facts, continued:—

With respect to what is called Mr. *Mackrell's* right of water, that was simply a license from his landlord while the tenancy lasted to have a supply of water from the premises comprised in Lot 6, which also belonged to his landlord, and which were let to the Plaintiff subject to that license. In no other sense could it be called a right of water. As soon as the tenancy was determined, which the landlord could have done at any time by giving six months' notice, *Mackrell* would have had no more right of water than a perfect stranger.

What took place at the auction was this, as I conclude from the

(1) 29 L. J. (Q. B.) 145.

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evidence: Lots 4 and 6 were first put up together, and they were purchased by the Plaintiff. Then Lot 5 was put up. Mr. *Bigg*, on behalf of Mr. *Mackrell*, applied to the auctioneer to know whether the supply of water which *Mackrell* as tenant was having from Lot 6 was to be continued to the purchaser of Lot 5; and I think the result of the evidence is, that the auctioneer gave neither an affirmative nor a negative answer, but only referred to the conditions of sale, which declared that the property was sold subject to all rights of way and water, and other easements, subsisting thereon.

The question then is, what is the effect of the conditions of sale; because it is clear, assuming the facts to be as I have stated, that the Plaintiff and *Mackrell* when they respectively signed their several contracts, did so on the footing of the conditions of sale, and nothing else.

The tenth condition declares that each lot was sold subject to all rights of way and water, and other easements, if any, subsisting thereon. What then is the meaning of that language? It could not refer to any right of way or water as between one lot and another, for all the lots were the property of the vendor in fee, who could not have a right of way or water as against his own property.

It is not suggested that it was intended by the Defendant or his agent, in framing that condition, that it should refer to any right which the purchaser of one lot was to have as against the purchaser of another lot. Indeed, we have complete evidence to the contrary; for after the sale, and when the title to Lots 4 and 6 was accepted by the Plaintiff, and the draft conveyance of those two lots was prepared, it was approved by the vendor's solicitor, and returned to Plaintiff's solicitor, without any mention of any such liability as that which is now insisted upon by the Defendant, and the draft so approved was engrossed and sent to the vendor's solicitor for execution, and the execution was not then refused, though it was accidentally delayed. The only purpose of this tenth condition was to protect the vendor from liability in case it should appear after the sale that the property sold was subject to some right of way or water, or other easement, in favour of some third person, the existence of which was unknown to the vendor.

If it had been intended to create a right or liability as between the purchasers of different lots, it ought to have been, and doubtless would have been, clearly so expressed.

But then it is contended by the Defendant that this is a case in which both vendor and purchaser acted under a material misapprehension; and that as it has turned out differently from what was intended or expected, the transaction ought to be treated as a nullity. But, in the first place, that is not the issue raised by the Defendant. Up to the present time his contention has been, not that there was no effective sale, but that the purchaser had come under the twelfth condition, which provides that if the purchaser should fail to comply with the conditions his deposit should be forfeited and the vendor should be at liberty to re-sell the property. Moreover, it is quite clear that there has been no misapprehension on either side.

Another suggestion on the part of Defendant is, that the case comes under the 5th condition, by which it is provided that if the purchaser shall insist on any objection or requisition as to the title which the vendor shall consider himself unable, or on the ground of expense, or for any other reason, shall be unwilling, to remove or comply with, then the vendor may annul the sale and return the deposit. But the fact is, that the Plaintiff has never raised any objection or requisition as to the title; on the contrary, the title was accepted by him. Besides which, the Defendant has always hitherto insisted on being entitled to retain the deposit under the 12th condition.

The Plaintiff is entitled to a decree with costs, and with a declaration that the Plaintiff is not bound to give the reservation which is insisted on by Defendant.

Solicitors for the Plaintiff: Messrs. *King & Plummer.*

Solicitors for the Defendant: Messrs. *Clarke, Woodcock, & Ryland.*

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1866
June 20.

WATERLOW *v.* BACON.

Action at Law—Equitable Plea—Specific Performance—Injunction.

If a Defendant in an action at law pleads an equitable plea, he cannot come for an injunction to restrain the action upon the same ground which is the subject of the plea, provided the Court of law can give such relief as this Court will give. But if it cannot, then the equitable plea is no bar to the Defendant coming to this Court, subject, however, to the costs of the plea being controlled by the Court of equity.

This Court will restrain an action for damages where the defence relied upon is an alleged agreement between the parties for the performance of certain acts, which a Court of law cannot give effect to.

THE Plaintiff was the owner of certain stables and premises at *Storey's Gate, Westminster*, and the Defendant was in possession of a dwelling-house and farrier's shop, in the rear of, and adjoining the Plaintiff's premises.

On the 18th of February, 1865, the Plaintiff gave notice, in writing, to the Defendant, under the *Metropolitan Building Act*, that he intended to pull down and re-build the wall which separated his premises from the Defendant's shop, to which the Defendant consented, provided his premises were made secure while the work was in progress, and that there was no detriment to his business caused by such building. In January last the Plaintiff began to build his wall, and the Defendant was informed that the new wall would be much higher than the old wall, and thereupon interviews took place between the Plaintiff's surveyors and builders and the Defendant, when the proposed height of the new building was the subject of much conversation, and the probability of damage to the Defendant, and his title to compensation, were discussed. The bill alleged that it was ultimately agreed, that Defendant should permit the Plaintiff to build up his new wall according to the plan proposed, and that the Plaintiff should, at his own expense, construct for the Defendant new and larger skylights in the roof of his shop, and should not call upon the Defendant for any contribution towards the erection of the party-wall under the provisions of the *Metropolitan Building Act*.

After the completion of the new wall, the Defendant complained

of the damage done to his workshop and premises, and some negotiation took place between the parties; but no satisfactory result was arrived at, and then the Defendant commenced an action against the Plaintiff, claiming damages for an obstruction of light and air to his windows and skylights, by the erection of the Plaintiff's wall.

In defence, the Plaintiff put in an equitable plea, and alleged that the Defendant had notice of the Plaintiff's intentions and proceedings, and that he acquiesced in, and consented to, the acts being done by the Plaintiff, upon the terms that the Plaintiff should insert new skylights in the Defendant's shop, which he had always been willing to do; but which the Defendant refused to permit.

The Defendant joined issue upon the plea, and gave the Plaintiff notice of trial.

The Plaintiff was then advised that it was very questionable whether the above equitable plea could be successfully upheld in a Court of law, inasmuch as the relief sought thereby was in the nature of a specific performance, which a Court of law had not the means of compelling, and the Plaintiff therefore, would have no valid defence to the action. The Plaintiff thereupon filed this bill for specific performance of the alleged agreement, and now moved for an injunction to restrain the Defendant from proceeding with the action.

The Defendant denied the agreement set up by the Plaintiff.

Mr. *De Gex*, Q.C., and Mr. *Mackeson*, in support of the motion:—

Under the *Metropolitan Building Act*, it is provided that where a party-wall is to be pulled down, then the expense must be borne by the parties in proportions to be determined according to the Act. The Plaintiff, in pursuance of the provisions of the Act, gave notice to the Defendant that he meant to re-build the party-wall between their premises, and also to raise it to a much greater height. A negotiation took place between the Plaintiff's agent and the Defendant, and the Plaintiff alleges there was an agreement on the part of the Defendant that he would permit the Plaintiff to raise the wall as he proposed, if the Plaintiff would pay the whole expense incurred, instead of calling upon the Defendant to contribute his share of such expense under the *Building Act*, and

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he would also put in a new and a better skylight, in case his shop should be darkened by the new party-wall. The Plaintiff proceeded to build his wall, and, after it was finished, the Defendant brought an action against the present Plaintiff for damages. The Plaintiff pleaded equitable pleas, setting up the agreement forming the ground of the relief now asked; but it is evident that these pleas would not have the effect of deciding the question in dispute. The Court of law will not admit the validity of an equitable plea of an agreement, except in cases where a Court of equity will grant an unconditional injunction. Such an injunction could not be obtained in this case, and, consequently, a plea of this kind would be bad, and the Plaintiff at law would, if the verdict were given for the Defendant at law, obtain a rule to enter up judgment *non obstante veredicto*. The reason why a Court of law would not allow the validity of such a plea is, that it could not enforce against the Defendant at law the terms of the agreement. A Court of equity can alone do this, and, consequently, such a case is one only fitted for the jurisdiction of a Court of equity.

In the *Mines Royal Societies* v. *Magnay* (1) the Court of Exchequer refused to allow the equitable plea set up to be pleaded, on the ground that a Court of equity would require the execution by the Defendant of a valid surrender of a term, as a condition precedent to staying the execution, and that a Court of common law had no power to enforce such a condition. An equitable plea could not be dealt with so as to do justice between the parties. In *Wodehouse* v. *Farebrother* (2) it was held that a plea on equitable grounds could only prevail where, followed by a common law judgment, it would do complete and final justice. And in *Flight* v. *Gray* (3) it was decided that an equitable defence is only admissible where it sets up matter in respect of which a Court of equity would have granted relief unconditionally. It is true that in *Farebrother* v. *Welchman* (4), which may be cited on the other side, the Court refused to restrain an action; but this was on the ground that the substantial question was, the fact whether certain payments had been made, and that this could be decided by a Court of law.

It is said that we cannot come to a Court of equity because we

(1) 10 Ex. 489.
(2) 5 E. & B. 277.
(3) 3 C. B. (N. S.) 320.
(4) 3 Drew. 122.

have already chosen our tribunal by putting in equitable pleas at common law, but in fact there is nothing to prevent the Plaintiff from coming to this Court at any time before judgment. In *Evans* v. *Bremridge* (1), it was held that the Plaintiff had not lost his right to an injunction to restrain an action by setting up the same defence at law by equitable plea. And in *Terrell* v. *Higgs* (2), which may be also cited against us, an injunction to restrain an action was refused where an equitable plea had been pleaded, but that was because a verdict had already been found, and it was held, therefore, too late to come to a Court of equity. *Phelps* v. *Prothero* (3) is also in our favour.

The equity of the case is like that in *Fisher* v. *Moon* (4), and that a Court of equity could enforce the agreement against the Plaintiff in equity appears from that case, and from *Sanderson* v. *Cockermouth Railway Company* (5); *Day's Common Law Procedure Act* (6); *Bullen & Leake's* Precedents of Pleading (7).

Mr. *Baily*, Q.C., and Mr. *Deane*, for the Defendant:—

The evidence in this case does not warrant the conclusion that any agreement was ever entered into by the Defendant to permit the erection of this wall. The Plaintiff alleged that there was an agreement, but yet he shews by one of his letters that he did not know of any such agreement, though he was afterwards told by his agent that there was one. We do not now seek to prevent the Plaintiff from building, but we ask for substantial damages, and this is precisely the relief which a Court of law can give. As regards any consideration being given by the Plaintiff, in the shape of paying the whole expense of the wall, it is, in the first place, doubtful whether the Plaintiff could have enforced any proportionate contribution where there was no dilapidation which would render it necessary to rebuild, but even if that could be enforced, still the Defendant would have been entitled to deduct his share of the expense from his rent, so that the alleged equivalent or consideration would have been of no value, and as to the skylight, the only agreement alleged is to give the Defendant new and better

(1) 8 D. M. & G. 100.
(2) 1 De G. & J. 388.
(3) 7 D. M. & G. 722.
(4) 11 L. T. (N. S.) 623.
(5) 11 Beav. 497.
(6) Page 245.
(7) Page 487.

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skylights, without defining them. The terms of this agreement, if there ever was such an agreement, are too vague to be enforced by a Court of equity. The real issue is the same here as it is in the action at law, and the Court of law is the proper tribunal to try the question, but even if it be not so, still the Plaintiff cannot come into equity upon the same grounds which he has made the subject of his equitable pleas at common law. The cases cited do not apply to a case of this nature, where damages only are sought. There has been no acquiescence here, as the Defendant gave notice to the Plaintiff not to proceed with his wall when it had reached a height of five feet above the old building, but the Plaintiff proceeded with the work at night, and got it finished before an injunction could be applied for. The only remedy, therefore, is by an action at law for damages, and to an action of this kind such delay as is here alleged, even if made out, would afford no defence or objection at law or in equity.

Mr. *De Gex*, in reply:—

We shew by the evidence that all the parties believed in the existence of an agreement. It is true the agreement was not in writing, and that was the origin of the litigation, but even if the agreement had not been (as it has been) fully proved, there is ample evidence of acquiescence on the part of the Defendant, and acquiescence is a ground for restraining an action at law: *Powell* v. *Thomas* (1); *Duke of Devonshire* v. *Eglin* (2).

[The VICE-CHANCELLOR asked in what terms a decree could be made at the hearing, so as to direct the performance of the agreement on the part of the Plaintiff.]

Mr. *De Gex*:—An inquiry might be directed in Chambers, similar to the reference in *Sanderson* v. *The Cockermouth Railway Company*.

SIR R. T. KINDERSLEY, V.C.:—

The Plaintiff's case is, that he being about to raise the party wall between his own premises and those of the Defendant to a

(1) 6 Hare, 300. (2) 14 Beav. 530.

considerable height, which might darken the Defendant's skylight, an agreement was entered into between him (the Plaintiff) and the Defendant that he might raise the wall to the proposed height on the terms that he should not call upon the Defendant to contribute to the expense of rebuilding the party wall under the *Metropolitan Building Act*, and, moreover, that if there should be a darkening of the light coming to the Defendant's skylight, then the Plaintiff should give him new and better skylights. That is the Plaintiff's case in substance. The Defendant, on the other hand, denies the agreement as so stated. There is a conflict of evidence on the point, but there is no doubt there was a good deal of negotiation between the parties, or their agents, tending to such an agreement. If the case stood there, the Plaintiff alleging such an agreement, and the Defendant denying it, and at the same time there being circumstances which make it not improbable that the Plaintiff may turn out to be right at the hearing, then unless the agreement is such as it is clear this Court cannot execute, it would be almost a matter of course to grant an injunction to restrain the action in order that the agreement, specific performance of which is sought, may, if established, be carried into effect at the hearing of the cause. But there is this peculiarity in the case, that the Plaintiff has thought fit, in the action, to plead an equitable plea of the very circumstances which he relies upon in this bill; and it is insisted that after filing such an equitable plea at law, he cannot come here for an injunction to stay the action. Now it appears to me, on the authorities referred to, that the rule on the subject is this: If a Defendant in an action thinks fit to plead an equitable plea, he cannot come to this Court for an injunction to restrain the action on the very ground that he has made the subject of his equitable plea, provided always that the case is of such a nature, and the form of the pleading at law is such, that the Court of law can and will give such relief on the equitable plea, supposing it established, as this Court will give. But if the Court of law cannot give such relief, or if from the mode in which the pleadings are framed, the matter of the equitable plea may never come on for the decision of the Court of law, then this Court will not refuse to entertain a bill for an injunction to restrain the action, merely on the ground of the Plaintiff in equity having

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pleaded such equitable plea in the action; though of course in such case this Court will deal with the question as to the costs of the action, and especially as to so much thereof as may have been caused by pleading the equitable plea.

Such being, in my opinion, the rule to be deduced from the cases on the subject, is the alleged agreement (supposing it to be established), such that a Court of law could give the relief which this Court would give, so as to do complete justice between the parties? Clearly not. A Court of law could not compel the Plaintiff to supply the Defendant with new and better skylights than those which he previously had, which is one of the terms of the alleged agreement. And therefore, notwithstanding the equitable plea, the Plaintiff is entitled to file his bill for specific performance of the agreement, and to apply for an injunction to restrain the action.

It was further contended on the part of the Defendant, that with respect to the term of the alleged agreement, that Plaintiff should supply to the Defendant's shop more effective skylights, it is not specified how large the skylights were to be; and that on the ground of this uncertainty, the Court will not decree specific performance. On the other hand, it is argued that in such a case this Court will ascertain what skylights are necessary to give the Defendant as much light as he had before. That is a question to be decided at the hearing, and I shall not express any opinion upon it now.

I must grant the injunction to stay further proceedings in the action, on the usual undertaking by Plaintiff to give judgment in the action, but not to be entered up without the leave of the Court; and an undertaking to submit to such order as this Court may think fit to make as to the costs of the action; and to submit to such order (if any) as this Court may make as to the construction of the new skylights; Plaintiff to give notice of motion for a decree within a month.

Solicitor for the Plaintiff: Mr. *Withall.*

Solicitors for the Defendant: Messrs. *Hedges & Stedman.*

In re EUROPEAN BANKING COMPANY. *Ex parte* BAYLIS.

V.-C. K.
1866
July 3.

Winding-up Order—Several Petitions—Costs—Shareholders and Creditors.

Where several Petitions are presented for winding-up a company, the Court will consider the circumstances of each Petition as if it were a separate one.

Where a Petitioner was a creditor of a banking company for only £65, and the debt was attached in the Lord Mayor's Court, the Petition was, under the circumstances, dismissed with costs.

Where a Petition is dismissed, shareholders who oppose will have one set of costs, and creditors who oppose, another set of costs.

In re Humber Ironworks Company (1) not followed.

THIS was one of six Petitions presented for the winding-up of the *European Banking Company, Limited.* The Petition was transferred from Vice-Chancellor *Stuart's* Court, in consequence of an order having been made here on other and earlier Petitions.

The Petitioner, *Charles Baylis,* was a customer of the bank, and at the date of the Petition there was a balance of £65 standing to his account; but this debt had been attached in the Lord Mayor's Court by a creditor of the Petitioner.

Mr. *Haddan,* for the Petition, asked that the costs of the Petitioner might be paid out of the assets of the company.

Mr. *Glasse,* Q.C., and Mr. *Roxburgh,* for the company:—

It is submitted that this Petition ought to be dismissed with costs. A week before the presentation of the Petition, the bank was served with process issued from the Lord Mayor's Court, whereby the Petitioner's debt was attached at the suit of the *Financial Discount Company.* The object of presenting a Petition for winding-up a company, is to obtain payment of a debt; but this Petitioner cannot be entitled to receive payment since he was not the owner of the money at the time, and was, therefore, not a creditor. He knew that other Petitions had been presented, and he must have been aware of the circular issued by the company, giving notice that the affairs of the company were in process of

(1) Law Rep. 2 Eq. 15.

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being wound up under the direction of the Court. He was, therefore, not justified under the circumstances in presenting this Petition.

Mr. *T. A. Roberts*, for some of the shareholders:—

The creditors of this company will all be paid in full; but the shareholders are damaged by so many Petitions being presented.

Mr. *J. Napier Higgins*, for Mr. *Elvery*, who presented the first Petition, on which an order had been made for the appointment of provisional liquidators, said he was instructed to appear on this Petition in Vice-Chancellor *Stuart's* Court to inform the Court of such appointment, and to oppose any order being made which would interfere with the liquidators so appointed. He asked for his costs.

Mr. *Haddan*, in reply:—

It is only necesssary for a Petitioner to shew that he is a creditor to entitle him to present a Petition. The amount of the debt is immaterial. The attachment in the Lord Mayor's Court might be removed at any time, and the Petitioner is still the owner of the debt, subject to a claim by another person.

Sir R. T. Kindersley, V.C.:—

However desirable it is to avoid a number of Petitions being presented for the winding-up of a company, I am not aware of any rule having been established with a view to limit the number of them. But still every one of these Petitions ought to be looked at separately upon its own merits, as if it were the only Petition presented. The question then is, whether, if there were no other Petition than this of Mr. *Baylis*, an order for winding-up the company ought to be made thereon. Though Mr. *Baylis* appears as a creditor in the books of the company for £65 (a very inconsiderable sum), the fact is, that before the Petition was presented, an action had been brought against him by one of his creditors in the Lord Mayor's Court, under which this debt, which was assumed to be due to him from the *European Bank*, was attached. It is true that does not absolutely do away with the

debt, and he still remains legally a creditor of the bank. But the attachment is more efficacious than a mere stop order, for it seizes the debt into the hands of the Lord Mayor's Court. Under these circumstances, I am of opinion that if this had been the only Petition, the Court would not have made an order upon it to wind up the company, on the ground that the interest of the Petitioner as a creditor is so uncertain in its character, that the Court ought not, upon the ground of that interest, to impose upon the shareholders of the company so great a burden as a winding-up order. Dealing with the Petition as if it had been the only one presented, I shall dismiss it with costs.

Mr. *Haddan* then asked that the costs should be limited to those incurred by the company, and cited the rule laid down by the Master of the Rolls in *In re Humber Iron Works Company* (1), that where a Petition to wind up a company was dismissed, the Petitioner would be ordered to pay the costs of the company, but not of any other person appearing either to support or oppose the Petition. If, on the contrary, the winding-up order was made, then the Petitioner and the company would have their costs out of the estate, and shareholders and creditors who appeared to support the Petition would have one set of costs between them.

Mr. *Roberts* cited *In re The Marlborough Club Company* (2).

SIR R. T. KINDERSLEY, V.C.:—

A rule which tends to diminish the costs of proceedings under a Petition for a winding-up order, ought I think to be followed in principle. Where a Petition is presented, and shareholders and creditors appear to support the Petition, and an order for winding-up is made thereon, then the shareholders who support the Petition ought not to have separate sets of costs, but all are to have one set of costs only among them, and likewise all the creditors who appear to support the Petition are to have but one set of costs among them. That is what I understand to be the rule of the Master of the Rolls, and, if so, I concur in it to that extent, where the Petition succeeds. But where the Petition is dismissed with costs, I

(1) Law Rep. 2 Eq. 15. (2) Law Rep. 1 Eq. 216.

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confess it appears to me right, upon the same principle, that the shareholders and creditors who have appeared to oppose the Petition should respectively have one set of costs among them, that is, one set of costs to the shareholders, and one set to the creditors. I shall allow one set of costs to be paid by Petitioner to the shareholders who have appeared to oppose the Petition. In this case no creditors have appeared.

The right of the provisional liquidators to costs stands upon special grounds and I think they are justified in appearing, and must have their costs from the Petitioner.

Solicitors for the Petitioner: Messrs. *Mercer & Mercer.*
Solicitor for the Company: Mr. *Taylor.*
Solicitor for the Shareholders: Mr. *R. W. Roberts.*
Solicitors for the Provisional Liquidators: Messrs. *Harrison & Lewis.*

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MIDLAND RAILWAY COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway Directors—Traffic Agreement as to contemplated Line—Ultra Vires—Implication.

The managing body of a railway company has no power to enter into a contract fixing and regulating the future traffic which may be carried upon a line of railway which the company may thereafter be empowered to construct, so as to give to another railway company an interest in such traffic and profits.

The Court will not by implication import conditions, not expressed, into an agreement, unless there is something in the agreement which shews that the parties must have intended such conditions.

THIS suit was instituted for the purpose of having the rights and interests of the Plaintiffs and Defendants to a large sum of money in the hands of the *Railway Clearing House Committee*, ascertained and declared by the Court; and for the construction by the Court of an agreement dated the 1st of January, 1856.

Prior to 1856, there existed two main lines or routes of railway, each composed of several distinct companies, by which

through passenger and goods traffic was booked between *London* and *Edinburgh*. One of these main lines belonged to the *Midland Railway Company*, and some other companies in connection with it, and the other main line belonged to the *North Western Railway Company*, and other companies who were Defendants to the suit; and considerable competition having existed between these two routes, the companies to whom they respectively belonged, with a view of putting an end to the competition, entered into an agreement, dated the 1st of January, 1856, regulating the terms upon which the through traffic on the competing routes should be worked; and providing that the gross revenues derived from the through traffic on the two routes should be divided by the *Railway Clearing House* in the proportions stated in a schedule to the agreement.

The agreement, after defining what the two routes were to which it referred, and making regulations as to how the traffic should be worked and the revenue derived therefrom applied, provided by the 20th section that each of the companies, parties thereto, should, during the subsistence of the agreement, so far as they reasonably could, encourage and promote, in accordance with the terms and provisions of the agreement, the expeditious passage and continuous transmission of the traffic to which the agreement related, and should carry on and conduct such traffic faithfully the one towards the other, according to the true spirit and intent of the agreement, and would not by booking short of the place of ultimate destination, and then re-booking, or by secret or other allowances or drawbacks, or by quoting or charging lower rates from or to intermediate, or neighbouring, or other stations, or by granting tickets without money, or free passes, or an extension of credit beyond what was agreed upon between the parties thereto, or the said committee of managers, or by any other means or inducement whatsoever, cause or promote the said traffic to go or be sent, travel or pass to its place of destination, so that the same, or the revenues derived therefrom, should not appear and be treated as part of the traffic and revenues to which that agreement related, or so as to prevent such traffic from being carried, or the revenues therefrom divided and apportioned in accordance with the *bonâ fide* intent and meaning of the terms of the agreement, or so as to

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cause the same to be divided and apportioned differently than would have been the case, in case such traffic had been sent and booked, or forwarded through, directly from its place of dispatch to its place of ultimate destination, in conformity with the terms and spirit of the agreement.

The agreement was to continue in force for fourteen years.

Subsequently the Plaintiffs by carrying on their old line for a certain distance, and thence on a new branch, and then by means of running powers they had acquired over one of the Defendant companies' lines, acquired a new through route from *London* to *Edinburgh*, and had been booking and carrying through traffic thereon, and it was in respect of the proceeds of the traffic on such new through route that the question in the suit arose; the Plaintiffs, the *Midland Railway Company*, contending that it did not come within the agreement of 1856, while the *North Western Railway* and connecting companies claimed under that agreement to be entitled to share in it.

Sir *R. Palmer*, Q.C., Mr. *W. M. James*, Q.C., and Mr. *Speed*, for the Plaintiffs:—

This new line cannot be held to come within the agreement of 1856. It does not come within the definition of the lines with regard to the traffic on which the agreement was entered into, and all the subsequent parts of the agreement apply only to the routes so defined; and there is nothing within the agreement to lead to the implication that it was the intention of the parties, though not expressed in terms, to include any new route.

But even supposing that this new route could be considered as being within the terms of the agreement, or that the Court could by implication hold that it was included, the new route was not in existence at the date of the agreement, and it would have been *ultra vires* for the managing bodies of the different companies to make traffic arrangements with regard to it, and such an agreement would be illegal: *Maunsell* v. *Midland Railway Company* (1).

If, however, we are wrong on both points, and the new route is within the agreement, then we say that the Defendants' proper

(1) 1 H. & M. 130.

remedy is in damages for breach of the agreement, and the revenue from traffic carried is not divisible under the agreement.

Mr. *Baily*, Q.C., and Mr. *Wickens*, for the *North British Railway*, supported the Plaintiffs' contention.

The *Attorney-General* (Sir *H. Cairns*), and Mr. *C. Hall*; Mr. *Bristowe*; Mr. *Methold*; Mr. *Williamson*; Mr. *Osborne*, Q.C., and Mr. *O. Morgan*; Mr. *Shapter*, Q.C., and Mr. *Morris*; Mr. *Rolt*, Q.C., and Mr. *Stevens*, for the different Defendant companies:—

The new route is bound by the contract entered into in 1856. Parts of the new route formed parts of the old route, and to that extent the new route is within the definitions in the agreement. But if not within the express definition of the routes to which the agreement should apply, the intention of the agreement was that all through traffic between the two termini should be carried on the two existing routes, and by no other route; and the agreement expressly provides that the parties to the agreement should not by any means cause traffic to be carried so as not to come within the agreement; and if this intention be not clearly expressed in terms, the Court will imply it.

Under the agreement of 1856 the different companies parties thereto became partners as carriers for working the through traffic, and being such partners neither of them has any right to engage in an undertaking giving them a direct interest adverse to the partnership: *Glassington* v. *Thwaites* (1); and if one of them enters into any such undertaking, the other partners are entitled to share in the profits: *Lock* v. *Lynam* (2); *Russell* v. *Austwick* (3). Part of the new route constitutes partnership property, and a partner using partnership property must account to his partners for profits made by such user: *Gardner* v. *M'Cutcheon* (4); and as between partners, unliquidated damages from one to another must be reckoned: *Bury* v. *Allen* (5).

The agreement of 1856 is a perfectly lawful agreement, and one which the directors of the companies had power to enter into; that

(1) 1 S. & S. 124. (2) 4 Ir. Ch. Rep. 188; S. C. Lindley on Part. 507.
(3) 1 Sim. 52. (4) 4 Beav. 534. (5) 1 Coll. 589.

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is decided in *Hare* v. *London and North Western Railway Company* (1). It may be that the Court could not, by injunction, prevent either company from carrying by a third route, but the Court would compel the company so doing to account for their profits under the agreement. There is no Act of Parliament touching the through traffic, and no obligation on either company to book or carry through traffic, the through route being composed of several lines of railway belonging to different companies, and not of one line; and the companies have a perfect right to make any arrangement as to the working and profits of such through traffic, unfettered by any parliamentary enactment.

There is a distinction between enforcing illegal agreements, and asserting title to money which has arisen from them; and where a Plaintiff comes and asks the construction of an agreement with a view to assert such title, the Court will not refuse to administer justice between the parties, because it is an illegal agreement, or one which violates an Act of Parliament; nor will the Court allow one of two partners to retain partnership property, on the ground of illegality of the agreement: *Sharp* v. *Taylor* (2).

Sir *R. Palmer*, in reply:—

The Court will not, by implication, import terms into an agreement unless there is something in the contract which would sustain such an implication, *Churchward* v. *Reg.* (3); but there is nothing of the kind here. If the intention was to prevent either company from working a new line, it is only reasonable to suppose that the parties would have expressly provided for it. The agreement was only with reference to existing lines.

Railway companies have no power to enter into partnerships, and no agreement could be made by them not authorized by the 87th section of *The Railways Clauses Consolidation Act* (4): *Shrewsbury and Birmingham Railway Company* v. *London and North Western Railway Company* (5).

In *Hare* v. *London and North Western Railway Company*, the question simply was as to existing routes, and the case of a new

(1) 2 J. & H. 80
(2) 2 Ph. 801.
(3) Law Rep. 1 Q. B. 195, 211.
(4) 8 Vict. c. 20.
(5) 6 H. L. C. 113.

route does not appear to have presented itself to the minds either of counsel or of the Judge.

The companies had no power to enter into any agreement restraining an application to Parliament; that is the effect of this agreement, and it is, therefore, illegal.

[He also referred, on the question of legality, to *Stockton, &c. Railway Company* v. *Leeds, &c. Railway Company* (1); *Heathcote* v. *North Staffordshire Railway Company* (2); *Lancaster and Carlisle Railway Company* v. *North Western Railway Company* (3).]

July 28. SIR R. T. KINDERSLEY, V.C.:—

Three questions present themselves: — First, whether the agreement of January, 1856, contains an express contract between the several companies, that the revenue to arise from the traffic carried along any new route which any one or more of them might thereafter make, or join with other companies in making, between *London* and *Edinburgh*, and other parts of *Scotland*, should come within the operation of the agreement, and be divided and distributed according to the provisions thereof: Secondly, if not, whether such a contract ought to be implied: and, Thirdly, whether such a contract would be legal.

[Upon the first question, His Honour, after examining and commenting upon the several clauses of the agreement, declared his opinion that such contract was not expressed by the terms of the agreement of January, 1856.]

The second question is, whether, having regard to the nature and provisions of the agreement, such a contract ought to be implied.

To justify the Court in implying a contract or covenant not expressed in terms by a given instrument, the case must be such (to use the language of one of the learned Judges in *Churchwood* v. *Reg.*) as to satisfy the judicial mind that the parties must have intended it; and that conclusion must be arrived at from

(1) 2 Ph. 666. (2) 2 Mac. & G. 100. (3) 2 K. & J. 293.

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something which is actually found within the instrument in question, and upon which such an implication can be hung. But so far from finding anything of the kind in this agreement of January, 1856, the conclusion I draw from the whole of the instrument is, either that the parties never thought of such a contract, or else, that they intentionally excluded it from the instrument. If they had the intention to make such a contract, is it possible that in framing such an elaborate instrument as this is, they should have omitted to provide for it by a special clause, and have left it to be conjectured and implied from the language of the 20th clause? Neither that clause, nor any of the other clauses, appears to me to suggest anything like a necessity for implying any such contract as is contended for by the Defendants. Where *A.* and *B.* enter into an agreement, by which *A.* agrees to sell certain property to *B.*, the Court implies a contract by *B.* that he will purchase the property. In such a case there is a judicial necessity for implying such contract by *B.* But here there is nothing whatever of the kind. There is nothing to lead to the conclusion that the parties must have intended to enter into such a contract as the Defendants contend for. Whether the possible formation of a new route was thought of, is left in uncertainty; although the elements of such new line, or parts of it, existed at the time of the agreement. I am of opinion that the contract in question cannot be implied.

As I am of opinion that such contract is neither expressed in the agreement of 1856, nor to be implied therefrom, it is, perhaps, hardly necessary to notice the third question, viz., whether such a contract would be legal, that is, whether it would or would not be *ultra vires* of the board of directors, or other governing body, of any one of these companies.

The question as to the legality of this agreement of January, 1856, came before the Vice-Chancellor *Wood*, in *Hare* v. *The North Western Railway Company*, when His Honour felt some doubt on the question, and expressed his opinion that the case was one of those which lie on the confines between what is and what is not lawful; but he came to the conclusion that the agreement was not unlawful, as its object was so to distribute the traffic of the two routes, and the revenue derived therefrom, among the companies,

as to prevent such a competition as would be ruinous to the companies, and not tending to the benefit of the public. But in that case the agreement was considered only with reference to its operation upon the profits of the traffic carried along the two then existing routes; the idea of a new route being formed was not suggested; nor was it so much as hinted that such a contract as the Defendants now insist upon, was contained in the agreement, or ought to be implied therefrom; and I am satisfied that the Vice-Chancellor, in coming to the conclusion (after some doubt), that the agreement was legal, regarded it only as an agreement relating to the traffic on the two routes then existing. If His Honour had supposed that the agreement was intended to be applied to the traffic upon any other line of railway which might thereafter be constructed, I think his conclusion would not have been in favour of its legality.

It is not easy to reconcile all the decisions on the question, as to what acts or contracts on the part of a railway company are, or are not, *ultra vires* and illegal. But I am of opinion, though not altogether free from doubt, that it would be *ultra vires* of the board of directors of such a company to enter into a contract fixing and regulating the future traffic which might be carried upon a line of railway which the company might thereafter be empowered to construct, and the profits of such traffic, so as to give to another railway company an interest in such traffic and profits.

There must be a declaration that the profits of the traffic of the new route do not fall under the operation of the agreement.

The costs of all parties must be borne by the fund.

Solicitors for the Plaintiffs: Messrs. *Beale, Marigold, & Beale.*

Solicitors for the Defendants: Messrs. *Bircham & Co.;* Messrs. *Blenkinsop, Hayes, & Co.;* Mr. *Batten;* Messrs. *Williamson, Hill, & Co.;* Messrs. *Johnston, Farquhar, & Leech;* Messrs. *Cunliffe & Beaumont.*

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July 2.

HENDERSON *v.* DODDS.

Administration—Realty—Costs—Creditors' Suit—Deficient Fund.

In a suit by creditors to administer the realty, there being no personalty, and the realty proving deficient, the Court ordered the costs of the Plaintiffs and of the Defendants, who were beneficial devisees, to be taxed as between party and party, and paid *pari passu* out of the fund, and the balance of the fund then remaining to be applied in payment of Plaintiffs' extra costs between solicitor and client, and then in payment of debts.

THIS suit was instituted by creditors for the administration of the testator's real estate, devised by his will. The debt owing from the testator's estate, in respect of which the Plaintiffs sued, was for unpaid calls on shares held by the testator in a bank which was in course of winding-up, under which the Plaintiffs were the official managers. The executors had, originally, been made Defendants; but it appearing that the personal estate had been all exhausted, they had been dismissed with their costs, and the only Defendants now before the Court were the beneficial devisees of the realty.

The cause now came on for further consideration, and the proceeds of the realty being admitted to be deficient, the question arose as to the principle upon which the costs of the Plaintiffs and Defendants were to be taxed and paid.

Mr. *Osborne*, Q.C., and Mr. *L. Field*, submitted that the Plaintiffs, being creditors, were entitled, as against the beneficial devisees, to have their costs taxed as between solicitor and client, and paid in priority to the Defendants' costs. They referred to *Tipping* v. *Power* (1); *Thomas* v. *Jones* (2).

Mr. *Toller*, Q.C., Mr. *Dickinson*, and Mr. *Rasch*, for the Defendants, distinguished *Tipping* v. *Power* (1) from the present case, as being a suit by an equitable mortgagee; and sub-

(1) 1 Hare, 405.

(2) 1 Dr. & Sm. 134.

mitted that the costs of the Plaintiffs and Defendants should be taxed as between party and party, and paid *pari passu*. They referred to *Gaunt* v. *Taylor* (1); *Loomes* v. *Stotherd* (2); *Wetenhall* v. *Dennis* (3).

Mr. *Field*, in reply.

SIR R. T. KINDERSLEY, V.C.:—

It appears to me clear, from the language of the judgment in *Tipping* v. *Power* (4), that the decision in that case was founded on the fact, that the suit was instituted by an equitable mortgagee, whose remedy was to have the mortgaged estate sold, and the proceeds applied in payment of his principal, interest, and costs; and if that fund was deficient, to have the deficiency paid out of the general estate. Of course, the proceeds of the mortgaged estate would be applicable to the payment, first, of the costs of the mortgagee, then of the interest, and, lastly, of the principal of the mortgage debt, so that if such proceeds were not sufficient to pay the whole, the deficiency would be in respect of so much of the principal money as remained unsatisfied. Thus the Plaintiff would have his costs of the suit as mortgagee in priority to other parties; and the question as to the costs of parties in a suit merely for administration, would not arise. The case of *Wetenhall* v. *Dennis*, was a case of pure administration; and the Master of the Rolls proceeded on the footing, that in an administration suit all parties properly before the Court for the purpose of such administration should have their costs *pari passu*, except the executors, who would have their costs in priority.

It appears to me, that in this case, the Plaintiff's costs should be taxed as between party and party, and not as between solicitor and client; and that the Plaintiffs and Defendants must have their costs as between party and party, paid *pari passu* out of the fund; and any surplus of the fund will be paid to the creditors towards satisfaction of their debts; subject, however, to this, that if such surplus is insufficient to pay the debts in full, the Plaintiffs will be entitled, as between themselves and the other creditors, to

(1) 2 Hare, 413.
(2) 1 S. & S. 458.
(3) 33 Beav. 285.
(4) 1 Hare, 405.

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have their extra costs as between solicitor and client, out of such surplus.

Solicitors for the Plaintiffs: Messrs. *Field, Roscoe, & Co.*

Solicitors for the Defendants: Messrs. *Shum & Crossman;* Messrs. *Ridsdale & Craddock.*

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TROUTBECK *v.* BOUGHEY.

Will—Separate Use—Rents—Interest, Dividends, and Proceeds—Corpus.

A testator gave all his real and personal estate to trustees in trust for his wife for life, and after her decease for his daughter absolutely; and he directed that the principal moneys, rents, issues, profits, interest, dividends, and proceeds which his wife and daughter, or either of them, should be entitled to under his will, should be paid into their own proper hands as the same became due, and not by way of anticipation; and should be for the separate use and benefit of his wife and daughter; and for which moneys, rents, issues, profits, interest, dividends, or proceeds, the receipt alone of his wife and daughter, whether covert or sole, should be an effectual discharge to his trustees:—

Held, that the *corpus* of the real estate was not given to the separate use of the testator's daughter.

JOHN GRITTON, by his will, dated the 21st of April, 1845, devised and bequeathed to his wife, *Elizabeth Gritton*, and *James Troutbeck*, all his real and personal estate, upon trust as to his real estate, to pay the rents and profits to his wife for life, and as to his personal estate, upon trust to convert into money, and invest the same in manner therein mentioned; and he directed his trustees to stand possessed of and interested in the said trust moneys, stocks, funds, and securities, in trust for his wife for life; and upon the decease of his wife, the testator devised and bequeathed all his real and personal estate to his daughter for ever absolutely; and he thereby expressly directed that the principal moneys, rents, issues, profits, interest, dividends, and proceeds, which his wife and daughter, or either of them, should be entitled to under his will, should be paid into their own proper hands, as and when the same became due, and not by way of anticipation, and should be to and for the separate use and benefit of his wife and daughter, indepen-

dently and exclusively of any husbands or husband with whom they, or either of them, might happen to intermarry; and without being in anywise subject to the debts, engagements, control, interference, or forfeiture, of any such husbands or husband, and for which moneys, rents, issues, profits, interest, dividends, or proceeds, the receipts alone of his wife and daughter, whether they were covert or sole, should be an effectual discharge to his trustees. And he further declared that his wife and daughter, or either of them, should not have the power to deprive themselves or herself of the personal receipt or benefit of the said moneys, rents, issues, profits, dividends, or proceeds, by sale, mortgage, charge, or otherwise by way of anticipation.

The testator died in November, 1845, leaving his wife and daughter surviving him. The wife, *Elizabeth Gritton*, married the Defendant, *Samuel Partridge*, in July, 1846, but no settlement was made upon her marriage.

Maria Gritton, the daughter, married the Defendant, *George Boughey*, on the 5th of February, 1850, and no settlement was made on her marriage.

Maria Boughey made her will on the 16th of July, 1852, and thereby, after giving her husband £200, gave and devised all the real property to which she was entitled under her father's will, subject to the life interest of her mother, to her husband, *George Boughey*, her stepfather, *Samuel Partridge*, and the Plaintiff, *James Troutbeck*; as to one moiety upon trust for the absolute use and benefit of her husband, his heirs and assigns for ever, provided he should survive her mother, but in case he should die in her lifetime (which event did not happen), then she gave and devised the said moiety to her mother, *Elizabeth Partridge*, her heirs and assigns for ever; and as to the other moiety of her said real property, upon trust for *Samuel Partridge* for life, and after his decease, upon such trusts as her mother should by deed or will appoint, and in default of appointment, to the use of her mother, her heirs and assigns for ever.

Maria Boughey died on the 18th of July, 1852, having had issue a child, born alive, which died shortly afterwards, in her lifetime. *Elizabeth Partridge* died on the 21st of June, 1858, without having executed the power of appointment given her by the

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will of *Maria Boughey*, and without issue by *Samuel Partridge*, and it was not known who was her heir-at-law.

The Plaintiff was now the sole trustee of the will of *John Gritton*.

George Boughey claimed to be entitled in fee simple to one moiety of the real estate of *John Gritton*, by virtue of the appointment contained in the will of *Maria Boughey*, his late wife; and he insisted that in case such claim should not be substantiated, he was entitled for his life, as tenant by the curtesy, to such moiety, and that he was also entitled for his life, as tenant by the curtesy, to the other moiety of the real estate.

The Defendant *Samuel Partridge*, claimed to be entitled to a moiety of the real estate for life, under the will of *Maria Boughey*.

The Defendant *John Gritton*, a nephew of the testator, *John Gritton*, claimed to be the heir-at-law of *Maria Boughey*, and as such entitled to the real estate so devised by the testator in trust for *Maria Boughey*.

The bill prayed that the trusts of the will of *John Gritton* might be carried into effect under the direction of the Court.

Mr. *Fischer*, for the surviving trustee, submitted the questions to the Court.

Mr. *Baily*, Q.C., and Mr. *Atkin*, for *George Boughey*:—

Under the will of *John Gritton*, the *corpus* of the property comprised in the will was given to the daughter, *Maria Boughey*, for her separate use, and she had the same power to dispose of it that she would have had if she had been a *feme sole*. It was not necessary for her to pass the estate by means of a deed acknowledged under the Act. In the case of *Taylor* v. *Meads* (1), it was held that a married woman having property settled to her separate use, and not restrained from alienation, had, as incident to her separate estate, and without any express power, a complete right of alienation, by instrument *inter vivos* (not acknowledged under the Act), or by will, and there was no distinction in this respect between an equitable fee and other property.

Mr. *Smart*, for the Defendant *Samuel Partridge*.

(1) 34 L. J. (Ch.) 203.

Mr. *Shapter*, Q.C., and Mr. *Batten*, for the heir of *Maria Boughey*, were not called upon.

SIR R. T. KINDERSLEY, V. C.:—

As the decision in the case of *Taylor* v. *Meads* was the decision of a superior Court, I should be bound to follow it, although it certainly is the first case in which it was held that the *corpus* of real estate could be settled to the separate use of a married woman.

But the question here is, whether, by the terms of the will of *John Gritton*, the *corpus* of the real estate was devised to the separate use of *Maria Boughey*. It appears to me clear that it was not; and I should be doing violence to the words of the testator if I were to put such an interpretation upon them. The testator, in the first place, gives all his real and personal estate, after the death of his wife, to his daughter absolutely; she, therefore, took a fee simple in the real estate, and she took the personal property absolutely. The testator then goes on to direct what he wishes in regard to the wife and daughter taking for their separate use; and in the description of the property which he intends them respectively to have to their respective separate use, he has used words which cannot include the fee simple of a freehold estate. He directs that "the principal moneys, rents, issues, profits, interest, dividends, and proceeds," to which his wife and daughter would be entitled under his will, should be paid into their own proper hands. How can the fee simple of real estate be paid into their own proper hands? The testator can only refer to that which may be paid into their own proper hands, that is, the income and *corpus* of the personalty, and the income of the real estate. Then he continues, "as and when the same shall become due, and not by way of anticipation." Those are not terms applicable to the *corpus* of real estate, which cannot "become due."

It is also directed that the receipts of the wife and daughter shall be sufficient discharges to the trustees for the said "moneys, rents, issues, profits, dividends, or proceeds." The testator must evidently have intended in this clause, to refer only to a money payment, for which a receipt could be given, and not to land,

V.-C. K. 1866 TROUTBECK v. BOUGHEY.

for which no receipt could be given. I think there is not a word in these clauses upon which a fair question can be raised, or that can be supposed to include the fee simple of the real estate.

The real estate was directed to be conveyed to the heir of *Maria Boughey*.

Solicitor for the Plaintiff: Mr. *Thos. Rogers*.
Solicitors for the Defendants: Messrs. *Clowes & Hickley*.

V.-C. K. 1866 *Feb.* 14, 22.

JONES *v.* HIGGINS.

Breach of Trust—Wife, Acquiescence by.

By a marriage settlement, it was declared that a sum of money, then in the hands of the lady's brother, should be held by the three trustees (one of them being the brother) upon trust, at the request in writing of the lady, to pay to her the whole or any part absolutely; and until such request, upon trust, when and as the same should come into their hands, to invest the same, and pay the interest to the wife for life, for her separate use, and after her decease as she should by will appoint, and in default of appointment to the husband. The money was allowed to remain for thirteen years in the hands of the brother, who paid the interest to the husband, and also paid him part of the principal, with the knowledge of the wife.

Upon the death of the husband, the wife filed a bill against the three trustees to compel them to replace the balance of the fund. The brother had become insolvent:—

Held, that the trustees were guilty of a breach of trust; but that the wife was debarred by acquiescence, from claiming as against the two trustees, who had neglected to call in the money.

BY a marriage settlement dated the 11th of May, 1849, between the Plaintiff, then *Mary Higgins*, of the first part, *David Jones* of the second part, and *W. Higgins*, *W. Gibbs*, and *J. Davis*, of the third part, after reciting that the Plaintiff was possessed of the sum of £800, of which £700 was then in the hands of the Defendant *W. Higgins*, the brother of the Plaintiff, and two sums of £50 secured by promissory notes, and that the Plaintiff had endorsed the said promissory notes to the Defendants, and that it had been agreed that *W. Higgins* should, as soon conveniently might be, pay

the said sum of £700 over to the account of himself and the Defendants *W. Gibbs* and *James Davis*: It was witnessed, that the Defendants *W. Higgins*, *W. Gibbs*, and *J. Davis*, or the survivors or survivor of them, or other the trustees or trustee for the time being of the settlement, should stand possessed of the £800, and the income thereof, upon trust for the Plaintiff until the marriage, and afterwards upon trust, at the request in writing of the Plaintiff, to pay to her the said sum of £800, or any part thereof, absolutely freed and discharged from the trusts therein declared; and subject to, and in default of, and until such request or requests, upon trust when and as the said moneys should come into their hands, with all convenient speed, with the consent of the Plaintiff, and the said *David Jones* or the survivor of them, and after the decease of the survivor, then of their and his own authority and discretion, to invest the same in parliamentary stocks or funds, or on real security in the names of the trustees for the time being, and to pay the proceeds thereof to the Plaintiff for her separate use; and after her decease upon trust for such persons as she should by will appoint, and in default of such appointment, upon trust for *David Jones* for life, and on his decease upon trust for the children of the marriage as therein mentioned; but in case there should be no such child (which event had happened) then upon trust for the said *David Jones*, his executors, administrators, or assigns. And the indenture contained the usual proviso, that the trustees should not be liable for any loss or damage which might happen in the execution of the trusts, unless the same should happen by or through his or their own wilful neglects or defaults respectively. The sum of £700 mentioned in the settlement had been lent to *W. Higgins*, at £5 per cent. interest, with the Plaintiff's sanction, and was in his hands at the time of the marriage, and *Higgins* was, at the date of the settlement, and for some years after, well able to pay the same.

David Jones received, with the sanction of the Plaintiff, the two sums of £50 due on the promissory notes, and also £200, part of the sum of £700, at different times, and he also received during his lifetime the interest upon the unpaid capital of the trust funds.

David Jones died on the 10th of February, 1862, and after his

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death the Plaintiff requested the Defendants, as trustees of the settlement, to pay her the interest arising from the sum of £700. Some negotiation then took place between the parties, when it appeared that the Defendants, *W. Gibbs* and *J. Davis*, had never received any of the trust money.

The bill charged that *Gibbs* and *Davis* were bound to have obtained payment of the sum of £700, or at least the sum of £500 balance thereof, from *W. Higgins*. That they never took any steps whatever to secure such sum, or any part thereof, but allowed the same to continue in the hands of *W. Higgins*, and under his sole control, and the Defendant, *W. Higgins*, was now unable to pay or secure the same. The bill prayed that it might be declared that the Defendants were personally liable to make good the sum of £500, part of the trust moneys, to which sum the present claim was limited, with interest thereon since the death of *David Jones*, and that the said sum might be duly invested, pursuant to the trusts of the settlement, or paid to the Plaintiff; and that the Defendants might pay the costs of the suit.

The Defendant, *W. Higgins*, in his answer, admitted that he had signed a deed prepared by Mr. *Harvey*, a solicitor, but of the particulars or contents whereof he was wholly uninformed until the Plaintiff's solicitors, in the early part of the year 1862, stated to him the effect thereof. The said deed was not explained to him, nor was any draft or copy thereof ever furnished to or seen by him, nor did he ever see the deed or hear anything about it until he was asked to sign the same, nor had he ever since seen it. When he signed the deed he considered that he had done all that was required of him; and he had no idea whatever that in signing it he had incurred any obligation to do anything more. He further stated that some time after the marriage, at the request of *David Jones*, he gave him a promissory note for the sum of £700, which he endorsed over to his bankers at *Tewkesbury*; that *David Jones*, with the sanction and consent of the Plaintiff (though not in writing), received not only the two sums of £50 due on the promissory notes mentioned in the bill, and the sum of £200, but also, at different times, other sums, amounting together to £400; in respect of all which sums, amounting in the whole to £600, he received from *David Jones* on the 22nd of December, 1860, the

following memorandum:—"*Tewkesbury*, 22nd Dec., 1860.—I have received at sundry times of Mr. *W. Higgins*, the sum of £600 on account of his note of hand, and for which I make my estate responsible, and hereby indemnify him for the above amount. (Signed) *David Jones*." He further stated that he was under the impression that *David Jones*, as the husband of the Plaintiff, was entitled to receive the money, and that it was not in any manner affected by the alleged indenture of settlement; and that the Plaintiff was fully aware of the payments so made to *David Jones*, she having frequently accompanied her husband when he called to receive the interest on the money, and that she did not in any way allude to the settlement, or, during her husband's lifetime, make any application for payment of the interest on the said £700; and he verily believed that the Plaintiff well knew, during the life of her husband, that he had received the £600, and that the sum of £100 only remained as the residue of the original sum.

The Defendants, *W. Gibbs* and *J. Davis*, by their joint answer stated that the former was a baker, and the latter a beer-house keeper. They alleged that they were asked by *David Jones*, before his marriage, to witness a deed which he was going to make to settle the property of his intended wife; that they were unfamiliar with deeds and legal instruments, and with the formalities attending the execution thereof; that a deed was produced, and a statement was made as to its purport or effect, from which they believed it was a deed for securing to the Plaintiff, after her marriage, a sum of money then in the hands of her brother, *W. Higgins;* but the deed was not read over in their presence, nor was anything said to lead them to suppose they had any interest or concern in its purport or contents; that the deed was signed in their presence by *David Jones*, and the Plaintiff, and by *W. Higgins*, after which they were asked by the solicitor, Mr. *Harvey*, to sign their names, which they did, and they believed that in signing the deed they had done so merely as witnesses to the signatures of the persons who had signed before them. They also alleged that they had never signed the deed intentionally or knowingly in any other capacity than as witnesses, and had never consented to be named trustees of the deed. The Defendants admitted that they had taken no steps to obtain payment

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of the £700, or the £500 balance thereof, but they had allowed the same to continue in the hands or under the control of *W. Higgins.*

The Plaintiff, in one of her affidavits, stated that she distinctly remembered the solicitor, *Harvey,* who prepared the settlement, reading it over and explaining it in the presence of herself, and *David Jones,* and the three Defendants.

The surviving partner of *Harvey* made an affidavit to the effect that *Harvey* was a very methodical person in his business transactions, and that it was his invariable rule to read over every deed executed in his presence, to the parties executing the same, and to explain to them the nature thereof.

W. Higgins, who had been in good business, and was a responsible man for nine years after the execution of the settlement, had since become insolvent, and did not now appear.

J. Davis, one of the other trustees, had died since the institution of the suit.

Mr. *W. Forster,* for the Plaintiff:—

It has been sufficiently proved by the evidence that the trustees were fully aware of the nature of the deed which they had executed, and they cannot escape liability by alleging such gross ignorance as that they did not know they were signing as parties to the deed. They were both men of business, and must have been aware that they were not mere witnesses. It was their duty, as trustees, to have called in the money, and to have seen that it was placed upon proper security, and not allowed it to remain in the hands of *Higgins.* If they had performed this duty any time within nine years after the execution of the settlement the money would have been forthcoming, since *Higgins* was during the whole of that time a responsible man; but they neglected to do it, and now the money cannot be obtained from *Higgins* on account of his insolvency. It is admitted by the Plaintiff that £200 of the money was paid to her husband, and for that amount she makes no claim; but the remaining £500 is fairly due from the other trustees, and ought to be made good by them. In *Fenwick* v. *Greenwell* (1), certain trustees who had neglected to enforce a

(1) 10 Beav. 412.

covenant in a settlement for the transfer of a sum of consols into their names were held to be personally responsible.

Mr. *Millar*, for the Defendant *Gibbs*:—

There is no improbability in two men who are unused to legal transactions, being ignorant of the fact that they were parties to a deed, and they might very naturally suppose they were only witnesses. But even if the Court should hold them to be liable as trustees they were only bound to invest the fund "when and as the said moneys should come into their hands." The trusts are of a very peculiar nature. The trustees are to stand possessed of the £800 and the income thereof, in the first place to pay any part thereof absolutely to the wife at her request in writing. Now it is evident that even if she made no such request in writing she was aware of the money having been received by her husband, and made no complaint to the trustees. The fund was placed in the hands of her brother, and if she did not direct that it should be paid over to her or to her husband, she acquiesced in the course pursued, and the fund being settled to her separate use, it is chargeable with any breach of trust committed with her acquiescence, and may be impounded to make it good. She is, therefore, barred from complaining: *Lewin* on Trusts (1). This case does not resemble *Fenwick* v. *Greenwell*, where the trustees had a duty imposed upon them by the deed.

Mr. *W. Forster*, in reply.

SIR R. T. KINDERSLEY, V.C., after commenting upon the facts, continued:—

It is quite clear that the Defendants executed the deed, and that they knew it was a marriage settlement which they were signing. The solicitor, Mr. *Harvey*, who prepared the deed, was present upon the occasion, and his surviving partner, a solicitor of respectability, states that Mr. *Harvey* was a very methodical man in his business transactions, and it was his invariable rule to read over every document attested in his presence to the parties executing it; and the Plaintiff swears the deed in question was

(1) 4th ed. pp. 497, 596.

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read over in the presence of the Defendants. I must, therefore, notwithstanding the statements of the Defendants, assume that the nature of the deed was made known to them, and that they had no reason for believing they were signing it merely as witnesses. They must have seen the seals set opposite to their names, and no doubt when they signed they used the words "I deliver this as my act and deed." It is impossible for me to accept such an excuse as they now set up. None but an idiot could go through such an operation without understanding what he was about. I must hold, then, that these Defendants accepted the trust, and bound themselves as trustees. It is then contended that, upon the true construction of this deed, there was no trust to be performed until the money reached the hands of the trustees. But by the terms of the deed they are directed to invest the money and pay the interest and income to the wife for her separate use; and it cannot be contended that they were at liberty to leave the money for any period of time in the hands of *Higgins*. There has been a clear breach of trust on their part.

The only remaining question is, whether, being satisfied that these Defendants accepted the trust, and that there was a breach of trust in not calling in and investing the trust money, Mrs. *Jones*, who for this purpose is to be regarded as a *feme sole*, did or did not acquiesce in the non-execution of the trust. Upon this subject I feel some doubt; and before I express my opinion upon it, I must read over the papers and consider the question.

Feb. 22. SIR R. T. KINDERSLEY, V.C.:—

I reserved my judgment upon one point only, that of acquiescence. [After again referring to the provisions of the deed, His Honour observed:] The evidence satisfies me that the Plaintiff must have known that the £700 had been allowed to remain in the hands of her brother, and also that some part of it had been paid to her husband without her previous consent. She was, in effect, the owner of the fund, and she ought to have seen that it was duly invested, if she desired that it should be so. She says she was convinced that the trustees had taken good security from

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Higgins; but not only was there nothing to lead her to that conclusion, but there was enough to lead her to the conclusion that it was not so secured. I cannot, therefore, make *Gibbs* answerable for the money left in the hands of the brother.

The bill must be dismissed against *Gibbs;* but inasmuch as *Gibbs* and his co-trustee insisted that they were not trustees, and have failed in that defence, it must be dismissed without costs. There will be a decree against *Higgins* for payment of the £500 and interest since the death of the husband, with costs.

Solicitor for the Plaintiff: Mr. *George Badham.*
Solicitor for the Defendant: Mr. *T. G. Norcutt.*

In re SEA AND RIVER MARINE INSURANCE COMPANY.

V.-C. K. 1866 *June* 29, 30.

Companies Act, 1862—*Winding-up Petition.*

The machinery of the Winding-up Acts is only applicable to companies where there are numerous shareholders.

Therefore in a company where there were only seven shareholders, and no debts, the Court dismissed a winding-up Petition with costs.

12 Eq. 460-9 4 Ch D. 575

THIS was a Petition by a shareholder to wind up the *Sea and River Marine Insurance Company, Limited.*

It appeared that there had been only 590 shares allotted out of a very large nominal number, and that of these, 200 had been allotted to, and the deposit thereon paid by, the Plaintiff; the company had never transacted any business, and it was not alleged that there were any debts. There were only seven shareholders, including the Petitioner. There had been an attempt at amalgamation with another company, to the directors of which it was alleged the directors had handed over the deposit money paid by the Petitioner. A resolution for a voluntary winding-up had been passed since the Petition had been presented.

Mr. *W. Morris,* for the Petitioner, under these circumstances did not press for a compulsory winding-up; but asked for the costs

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In re Sea and River Marine Insurance Co.

of the Petition, which, the fact of a voluntary winding-up having been agreed to, shewed had been properly presented.

Mr. *Glasse*, Q.C., and Mr. *Burgett*, referred to *In re Natal, &c., Company* (1), in which case Vice-Chancellor *Wood* had held that though there were so many as nine shareholders, and at least one debt, the machinery of the Winding-up Acts was not applicable.

Mr. *Morris*, in reply.

Sir R. T. Kindersley, V.C.:—

The view which the Vice-Chancellor *Wood* took in *In re Natal Company*, was, that the Winding-up Acts were passed for the purpose of winding-up companies where the shareholders are so numerous that the winding-up cannot be effectively carried out by a suit, and that they ought not to be put in operation in a case where the shareholders are few. Indeed a company, to come within the Acts at all, must consist of at least seven shareholders. His Honour the Vice-Chancellor *Wood* refused to apply the expensive machinery of a winding-up under the Act to a case where there were nine shareholders, and dismissed the Petition with costs. In the present case I find less reason for the Petition than in the case before the Vice-Chancellor *Wood*, there being here only seven shareholders, and no debts.

I think, therefore, this Petition must be dismissed with costs.

Solicitors for the Petitioner: Messrs. *Ashurst, Morris & Co.*

Solicitors for the Company: Messrs. *Howard, Dollman, & Lowther.*

(1) 1 H. & M. 639.

JENKYNS v. BUSHBY.

V.-C. K.
1866
July 2.

Production of Documents—Case for Opinion of Counsel—Letter between co-Defendants to forward to their Solicitor.

A case for the opinion of counsel, stated in reference to a separate litigation about the same subject-matter as the present dispute, and after it had arisen :—

Held privileged from production.

A letter written between co-Defendants respecting a matter in litigation, with direction to forward it to their joint solicitor :—

Held privileged from production.

THIS was an adjourned summons, taken out by the Plaintiff for the production of documents by the Defendants.

Among the documents, the production of which was sought, were a case for the opinion of counsel, with counsel's opinion. This case was prepared by the solicitors of *John Grant*, the predecessor in title to the Defendants, in contemplation of litigation respecting the same property as in the present suit; but with the Duchy of *Lancaster*. It was sworn that this case had been prepared after the questions in litigation in the present suit had arisen between the Plaintiff and *John Grant*.

Another document sought to be produced, was a letter written by one Defendant to his co-Defendant, containing a direction to such co-Defendant to send the same to their joint solicitor. In accordance with this direction, the letter was sent to the solicitor. This letter had reference to, and was occasioned by, the disputes which had then arisen between the Plaintiff and such two Defendants, which disputes were in issue in the present suit.

Mr. *Dunning*, for the Defendants, in support of the objections to production :—

With regard to the case, and opinion of counsel. Although the case was stated with reference to another litigation, and not to the present litigation, it was still about the same subject-matter as the present suit, and after the present dispute had arisen, and is privileged: *Flight* v. *Robinson* (1); *Holmes* v. *Baddeley* (2);

(1) 8 Beav. 22. (2) 1 Ph. 476.

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Combe v. *Corporation of London* (1); *Penruddock* v. *Hammond* (2); *Lord Walsingham* v. *Goodricke* (3); *Woods* v. *Woods* (4); *Calley* v. *Richards* (5); *Lawrence* v. *Campbell* (6).

The letter from one Defendant to another, with the direction to forward it to the solicitor, is in fact a communication between client and solicitor, and is privileged, although a letter between co-Defendants *simpliciter*, would not be privileged: *Walker* v. *Wildman* (7); *Bunbury* v. *Bunbury* (8); *Reid* v. *Langlois* (9); *Hooper* v. *Gumm* (10); *Carpmael* v. *Powis* (11).

Mr. *Everitt*, for the Plaintiff:—

The case stated for counsel's opinion being with reference to a different litigation, cannot be privileged; and the direction contained in the letter that it should be forwarded to the solicitor, does not take it out of the rule that letters between co-Defendants must be produced.

SIR R. T. KINDERSLEY, V.C.:—

With regard to the letter written by one of the Defendants to another, with the direction to send it on to their joint solicitor, I must hold it privileged.

The other question is with regard to the case and opinion of counsel. It appears that this case was submitted for the opinion of counsel, with reference to a litigation which had arisen between *Grant*, the Defendant's predecessor in title, and the Duchy of *Lancaster*, with respect to the same property as that which is the subject of litigation between the present Plaintiff and Defendant; and it appears that at that time the disputes between *Grant* and the present Plaintiff as to this property had arisen between them.

I know of no case precisely in point. But it is of great importance that confidential communications with solicitors and counsel should be protected; and it is impossible to say how far the points

(1) 1 Y. & C. Ch. 631.
(2) 11 Beav. 59.
(3) 3 Hare, 122.
(4) 4 Hare, 83.
(5) 19 Beav. 401.
(6) 4 Drew. 485.
(7) 6 Madd. 47.
(8) 2 Beav. 173.
(9) 1 Mac. & G. 627.
(10) 2 J. & H. 602.
(11) 9 Beav. 16; 1 Ph. 687.

V.-C. K. 1866 JENKYNS v. BUSHBY.

referred to in the case submitted for the opinion of counsel by *Grant*, may be the same as, or bear upon, those which arise in the present suit. I think that, upon principle, the case and opinion should be held privileged.

The costs will be costs in the cause.

Solicitor for Plaintiff: Mr. *Hacon.*

Solicitors for Defendant: Messrs. *Meredith & Lucas.*

HOPPER *v.* CONYERS.

V.-C. K. 1866 *April* 18.

Solicitor and Client—Misappropriation by Solicitor—Following Trust Funds—Lien upon Purchased Estate.

A solicitor having in his possession the title deeds of an estate mortgaged to his client, deposited the deeds with his banker as security for an advance, which he applied in the purchase of an estate on his own behalf. When the mortgage was paid off, he applied that money in repaying the loan from his banker, and informed his client that he had re-invested the mortgage money upon other good security. His client thereupon executed a re-assignment of the mortgage; but in fact the solicitor never re-invested the money, although he continued to pay interest upon it until his death:—

Held, that the client was entitled to a lien upon the estate so purchased by the solicitor.

BY an indenture of mortgage, dated the 5th of May, 1833, certain hereditaments were assigned to *George Hopper*, his executors, administrators, and assigns, for a term of 1000 years, to secure the repayment of a sum of £1700. *George Hopper* died in the year 1837, having by his will appointed his two sons, the Plaintiffs, *James Hopper* and *Thomas Hopper*, joint executors. By two subsequent indentures of mortgage the same property was assigned to the Plaintiffs to secure two further sums of £800 and £600, being part of the personal estate of the testator *George Hopper*. All the title deeds of the said hereditaments, including the before mentioned three mortgages, were left by the Plaintiffs in the custody of *Edmund Dale Conyers*, who was the solicitor and brother-in-law of the Plaintiffs *James* and *Thomas Hopper*.

V.-C. K. 1866 HOPPER v. CONYERS.

In the month of October, 1855, *E. D. Conyers*, as such solicitor, received notice from the solicitors of the mortgagors that the three mortgage sums, amounting to £3100, would be paid off on the 6th of April, 1856. Shortly before that day the mortgagors' solicitors wrote to *Conyers*, informing him that the money would not be ready at the appointed time; and *Conyers* thereupon sent his clerk to represent to the solicitors the great inconvenience that such delay would create, as he had made arrangements for the re-investment of the money on the 6th of April, and he should, therefore, be obliged to borrow the money of his bankers.

Conyers had at that time entered into a contract with Mr. *R. Jennings* for the purchase of a freehold estate, called the "*Whin Hill*" estate, situate at *Great Driffield*, at the price of £4200, which purchase was to be completed on the 6th of April; and informed his managing clerk that the £3100, when repaid by the mortgagors, was to be applied towards paying *Jennings* his purchase-money for the *Whin Hill* estate. As the mortgage money was not paid off on the 6th of April, Mr. *Conyers* deposited the title deeds of the mortgaged property with his bankers at *Driffield* as a temporary security, on which they advanced him the sum of £3000, and this sum was paid to *Jennings* in part payment of the purchase-money for the *Whin Hill* estate, and the purchase completed on the 6th of April, 1856, when the estate was conveyed to *Conyers* in fee.

On the 10th of May following the £3100 mortgage money was paid to *Conyers*, who obtained the deeds from his bankers, and delivered them to the mortgagors' solicitors, and repaid the £3000 advanced by the bankers on the same day out of the £3100 so received by him.

Soon after the three mortgages were paid off, *Conyers* presented to the Plaintiffs for execution a re-conveyance of the mortgaged hereditaments, with receipts for the three sums of £1700, £800, and £600 indorsed thereon; and he then informed the Plaintiffs that he had received the moneys and had re-invested them. The Plaintiffs, having full confidence in *Conyers*, executed the reconveyance and signed the receipts, but *Conyers* never informed them of what the security consisted upon which he had

re-invested the money. *Conyers*, however, regularly paid the Plaintiffs interest upon the money until his death, and the Plaintiffs believed that the £3100 was properly invested on mortgage of real estates. On the death of *Conyers*, which took place on the 8th of October, 1863, the Plaintiffs discovered, for the first time, the manner in which the money had been disposed of.

The Plaintiffs further discovered that *Conyers* had during his life obtained two separate sums of £2000 and £1000 upon mortgages of the *Whin Hill* estate, and had conveyed such estate to two mortgagees by way of security for such sums, and had applied the money to his own use.

Conyers made his will on the 11th of March, 1846, and thereby devised and bequeathed all his real and personal estate to his wife, the Defendant, *Mary Conyers*, and appointed her his sole executrix.

The bill stated that as the mortgagees of the *Whin Hill* estate had no notice of the misappropriation by *E. D. Conyers* of the £3100 belonging to the Plaintiffs, the Plaintiffs did not seek to claim any priority over them in respect of such mortgages.

The bill prayed a declaration that the Plaintiffs were entitled to a charge on the *Whin Hill* estate for the sum of £3100 and interest thereon from the 6th of April, 1863; that the said estate might be sold subject to the two mortgages; and that the sum of £3100 and interest might be paid to the Plaintiffs. It also prayed the appointment of a receiver.

Mr. *Glasse*, Q.C., and Mr. *Smart*, for the Plaintiffs:—

We have a right to follow the trust funds which were improperly applied in the purchase of an estate by our agent, *Conyers*. There is no doubt in this case about the identity of the money, as it has been traced from the mortgagor into the hands of the banker, who lent £3,000 a few days before the mortgage was paid off upon the security of the mortgage deeds, and for the express purpose of this purchase. In *Frith* v. *Cartland* (1) Vice-Chancellor *Wood* observed: "The rules as to following trust funds in the hands of a defaulting trustee apply against the assignees of such trustee as fully as against the trustee himself. So long as the trust property can be traced, and followed into other property

(1) 2 H. & M. 417.

V.-C. K. 1866 HOPPER v. CONYERS.

into which it has been converted, that remains subject to the trust. Another principle is, that if a man mixes trust property with his own, the whole will be treated as the trust property, except so far as he is able to distinguish what was his own. The sole question is, whether or not the trust property can be identified": *Taylor* v. *Plumer* (1); *Pennell* v. *Deffell* (2); *Attwood* v. *Small* (3); *Denton* v. *Davies* (4); *Lewin* on Trusts (5).

Mr. *Fry*, for the Defendant:—

The money was borrowed from the Plaintiffs by *Conyers* for the purpose of this purchase. The Plaintiffs were in the habit of placing money in the hands of *Conyers* to invest for them. They made no inquiry as to how it was invested. It came to his hands to do as he liked with it, and to invest it as he thought fit. The money was not entrusted to him for any special purpose, but to be invested generally. This is not, therefore, like the case of a trustee. *Conyers* was a mere agent for the *Hoppers*, and consequently the cases cited do not apply. The debt was only a simple contract debt: *Lench* v. *Lench* (6).

SIR R. T. KINDERSLEY, V.C.:—

I think the Plaintiffs are entitled to relief. I must consider the case as if it were between the Plaintiffs and Mr. *Conyers*, supposing he were still living. The question, in fact, is between the Plaintiffs and the general creditors of *Conyers;* but they cannot stand in a better position than that in which he could have stood. The facts are not in controversy. Mrs. *Conyers* is, no doubt, bound to protect the interest of the creditors, and she is acting rightly in putting the case in such a way as to lead the Court to the conclusion that there is no lien. She contends that transaction was merely a borrowing by *Conyers* of £3100 from the Plaintiffs; but, in truth, it was not so; and if the Plaintiffs are not entitled to the lien they claim, it cannot be on the ground that the transaction was a loan by the Plaintiffs to *Conyers*. If the money which was repaid by the mortgagors to *Conyers* had been actually applied by

(1) 3 M. & S. 562.
(2) 4 D. M. & G. 372.
(3) 6 Cl. & F. 232.
(4) 18 Ves. 499.
(5) 4th ed. p. 585.
(6) 10 Ves. 511.

him in purchasing the *Whin Hill* estate, I could not feel any doubt but that the Plaintiffs would have had a right of lien as against him. It is true the fact was not exactly so. But before the money was repaid by the mortgagors, *Conyers* had informed one of the *Hoppers* that the mortgage was about to be paid off, and he told him that when the money was repaid he would re-invest it on a mortgage of real estate. It is said that for this fact there is nothing but the oath of *Hopper;* but I cannot distrust that evidence, because it is quite in conformity with all the *res gestæ.* It is not improbable that *Conyers* at the time meant to give his clients a security on the *Whin Hill* estate for their money which he was thus applying in effecting the purchase. At all events, the money which he borrowed from the bankers on the deposit of the mortgage deeds of his clients, and which he could only have a right to borrow for their benefit, he applied in payment of the purchase-money of the *Whin Hill* estate. And when he received the mortgage money from the mortgagors, which was the money of his clients, he applied it in paying back to the bankers the money which he had borrowed from them, and which money he had used to purchase the *Whin Hill* estate. And the only question is, whether the intermediate transaction of borrowing the money from his bankers to pay for the *Whin Hill* estate, on the security of his clients' deeds, and then repaying it with his clients' money received from the mortgagors, makes any difference with respect to the right of lien which would clearly have existed if he had applied that money directly in paying for the *Whin Hill* estate, telling them that he had duly invested it on real estate. My opinion is, that it makes no difference whatever, and that the Plaintiffs are entitled to the decree they ask.

Solicitor for the Plaintiffs: Mr. *Camp.*
Solicitors for the Defendants: Messrs. *Hollings & Co.*

V.-C. K.
1866
Aug. 3.

In re OVEREND, GURNEY, & CO.

WALKER'S CASE.

Companies Act, 1862, s. 153—*Transfer after Winding-up—Registration—Approval by Directors.*

Where the articles of association of a company provided that no transfer of shares should be registered unless executed by the transferror and transferree, or unless the transferree had been approved by the board of directors, and a transfer was made after the stoppage of the company and the commencement of the winding-up, and such transfer was executed by the transferror only, but owing to the winding-up was not brought before the directors for their approval; upon application of transferror to be removed from the register of shareholders, and that the transferee's name might be inserted in lieu thereof:—

Held, that the Court could not dispense with the directions contained in the articles, and that the transfer not having been registered or submitted to the directors for their approval, the transferror's name must remain on the list of shareholders.

THIS was an adjourned summons, taken out by *Thomas Walker*, that the register of the members of *Overend, Gurney, & Co., Limited*, might be rectified, by removing his name from such register as a shareholder, and inserting in lieu thereof the name of *George Robinson*, in respect of fifty-five shares in the company.

The banking company stopped payment on the 10th of May, 1866, and, subsequently to that date, *Thomas Walker* agreed to sell the shares, on which £15 per share had been paid, to *George Robinson*, at £17 per share discount. *Thomas Walker* signed the transfer for such shares on the 31st of May, and the share certificates were delivered to *George Robinson* on the 10th of June. *George Robinson* never signed the transfer.

Three Petitions having been presented to wind up the company, a meeting of the company was held on the 11th of May, 1866, when a resolution was agreed to for a voluntary winding-up; and on the 22nd of June, 1866, Vice-Chancellor *Kindersley* made an order that such voluntary winding-up should be continued under the supervision of the Court.

It was provided by the articles of association that no transfer of shares should be registered in the books of the company, unless

and until it was executed by the transferror and transferree, and that until the name of the transferree should be entered in the register the transferror should be deemed the holder of the shares. The articles of association also provided that the directors might refuse to register any transfer where the transferree was not approved by the board of directors.

Owing to the stoppage of the bank, the transfer from *Walker* to *Robinson* was never registered, and the question was, whether *Walker* or *Robinson* ought, under the winding-up, to be treated as the holder of the shares.

It was not disputed that the transfer was *bonâ fide*.

Mr. *Glasse*, Q.C., and Mr. *E. K. Karslake*, for *Walker*:—

When *Walker* had signed the transfer, and the share certificates were handed over, the transfer was complete: he had nothing more to do with the matter, and it was the duty of the purchaser of the shares to do what was necessary to get himself registered; and the fact that *Robinson* has never been registered as a shareholder is owing merely to the stoppage of the bank, and cannot affect *Walker's* position.

By the 153rd section of the *Companies Act*, 1862 (1), it is provided that transfers of shares made between the commencement of the winding-up and the winding-up order shall be void, unless the Court otherwise orders. That section gives the Court a discretion, and in a case like the present, where admittedly the transfer is *bonâ fide*, and not made to a man of straw, the Court will uphold the transfer, which in the present case, owing to the stoppage of the bank, could not be brought before the directors to be approved of, their functions being at an end.

Mr. *Robinson* purchased the shares after the stoppage and commencement of winding-up of the bank, and must have known the liability he was incurring, and under those circumstances must be held liable in respect of these shares.

[They referred to *Ward's Case* (2); *Emmerson's Case* (3); *Taylor* v. *Stray* (4); *Wynne* v. *Price* (5); *Robinson* v. *Chartered Bank* (6).]

(1) 25 & 26 Vict. c. 89.
(2) Law Rep. 2 Eq. 226.
(3) Law Rep. 1 Ch. 433.
(4) 2 C. B. (N. S.) 175.
(5) 3 De G. & Sm. 310.
(6) Law Rep. 1 Eq. 32.

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Mr. *Baily*, Q.C., and Mr. *Roxburgh*, for the company, and Mr. *Kekewich*, for *Robinson*, were not called on.

SIR R. T. KINDERSLEY, V.C.:—

I am clearly of opinion that Mr. *Walker* must remain on the list of contributories. Whatever right of indemnity he may have against *Robinson*, that is not the question here; but the question is as between *Walker* and the other shareholders and creditors. Even if *Walker* and *Robinson* had agreed that *Robinson's* name should be placed on the list, the official manager would have a right to say this should not be done as a matter of right.

Walker was the registered shareholder, and was the person whom the other shareholders and the creditors had a right to treat as the holder, and liable in respect of these shares; and the articles of association provide that no transfer shall be registered unless duly executed by both the transferror and the transferree, and that the transferror shall be deemed the holder of the shares until the name of the transferree shall have been entered on the register; and further, that the directors may refuse to enter a transfer unless the transferree is approved by them. Those provisions are clear; they form part of the contract among the several shareholders for their general benefit, and the case must be governed by them.

It has been contended that the parties may supersede the necessity of bringing the matter before the board of directors; but the board of directors had the right to determine whether they would accept the transferree or not, and this Court has no power to deprive them of that right, or to substitute its own discretion for theirs, and to direct that the transferree shall be registered as a shareholder. I must consider the provision as to the transferree being approved of by the board of directors as a part of the agreement which all the parties entered into.

This question is quite irrespective of the question as to the time when the voluntary winding-up commenced, and the same objection would have applied if the transfer had been made before the stoppage of the bank, and the parties had omitted to bring the matter before the board of directors.

As this case has been brought forward with a view to decide the

question as to a numerous class, the costs of all parties must come out of the estate.

Solicitors for Mr. *Walker*: Messrs. *Bischoff, Coxe, & Bompas.*
Solicitors for the Company: Messrs. *Young & Co.*
Solicitors for Mr. *Robinson*: Messrs. *Dawes & Son.*

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1866
July 3, 9.

CARDIFF PRESERVED COAL AND COKE COMPANY *v.* NORTON.

Company—Winding-up—Joint Stock Companies Act, 1856—*Contributory—Creditor—Official Liquidator—Assets—Jurisdiction—Costs.*

4 Ch 484

When a company is being wound up under the *Joint Stock Companies Act*, 1856, the proper mode of recovering its assets in the hands of contributories is by a proceeding under the winding-up, and not by a suit.

The *A. Company*, a limited company, with all its shares fully paid up, sold its business and property to the *B. Company*, and as part of the consideration, 950 shares in the *B. Company* were distributed among the shareholders of the *A. Company*. The *A. Company* was afterwards ordered to be wound up in the Court of Bankruptcy:—

Held, that the *A. Company* and its official liquidators could not maintain a suit in equity against the shareholders, who had been placed on the list of contributories, to have the 950 shares in the *B. Company* transferred to the official liquidators as assets of the *A. Company*.

One of the official liquidators, being the only creditor of the company, and having obtained the winding-up order after refusing a tender of more than the amount of his debt, as proved in the winding-up, was ordered to pay the costs of the suit.

Affd 1 Ch 2 Ch 405

THE *Cardiff Preserved Coal and Coke Company, Limited*, was established in 1857, under the *Joint Stock Companies Act*, 1856, as a limited company, with a nominal capital of £20,000 in 4000 shares of £5 each, for the purpose of working a patent method of preserving coal and coke; 1900 shares were subscribed for, and fully paid up.

In October, 1860, the company being in difficulties agreed to sell and transfer the goodwill of its business, and its plant, machinery, and effects, to another company, called the *Crown Preserved Coal Company*, for £6500, of which £1750 was to be applied in discharge of the debts of the *Cardiff Company*, which were estimated not to exceed that amount, and the balance was to be paid in fully paid-up shares of the *Crown Company*, of the nominal value of £5 each, to be divided amongst the shareholders of the *Cardiff Company*, in the proportion of one *Crown* share for every two *Cardiff* shares. *Thomas Hill*, who was a director of both companies, took an active part in promoting the arrangement.

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By a deed, dated the 27th of October, 1860, and made between the *Cardiff Company* of the first part, the *Crown Company* of the second part, and *Henry Ommanney* (a shareholder in the *Cardiff Company*) of the third part, the *Cardiff Company*, in consideration of 950 shares in the *Crown Company*, delivered to *Ommanney*, who was thereby authorized by the *Cardiff Company* to receive them on behalf of the shareholders, in satisfaction of £4750, part of the purchase-money of £6500, and of £1750 retained by the *Crown Company* for the purpose of paying the debts of the *Cardiff Company*, assigned their business, machinery, stock in trade, and patents, and certain leaseholds, to the *Crown Company*, and the *Crown Company* covenanted to apply the £1750 in payment of the debts of the *Cardiff Company*.

The £1750 was so applied, and the certificates for 950 shares in the *Crown Company* were delivered to *Ommanney*, and were distributed by him among the shareholders of the *Cardiff Company*, who were thereupon registered as the owners of the shares in the books of the *Crown Company*.

In October, 1861, *Hill* made a claim upon the *Cardiff Company* for £648, and presented a Petition in the *Bristol* District Court of Bankruptcy, for the winding-up the company. On the 3rd of December, 1861, some of the shareholders offered him £426 in discharge of his claim, and £50 for costs, but he refused the offer, and on the 13th of December, 1861, obtained an order for the winding-up of the company. *Hill*, being the only creditor, appointed himself official liquidator, in conjunction with *Edward Miller*, the official assignee of the Court. Various proceedings were taken in the winding-up, both in the Court of Bankruptcy, and in the Court of Appeal, to ascertain the amount due to *Hill*, and this was finally settled to be £411 9*s.* 9*d.* by the Lord Justices, who ordered the costs of the proceedings to be paid out of the estate.

In order to provide for these costs, and the debt, the Commissioner made an order for a call of 7*s.* 6*d.* per share on the shareholders, all of whom had been placed on the list of contributories, being of opinion that the allotment to each shareholder of a £5 share in the *Crown Company* for every two shares held by him in the *Cardiff Company* was equivalent to a

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return of half the amount paid up upon his shares in the *Cardiff Company*.

The contributories appealed to the Lord Chancellor, who, in July, 1863, discharged the order, on the ground that the shareholders having once paid up their shares in full, there was no authority under the *Joint Stock Companies Act*, 1856, to make any call, but recommended the contributories to consent to pay the amount of the call, adding that if they resisted it, the official liquidators would have no other course than to institute proceedings for the purpose of making the property received by each individual available for the debts of the company. See *In re Cardiff Coal and Coke Company* (1).

On the 1st of August, 1863, the solicitor of the official liquidators applied to the contributories to pay, in proportion to their shares, *Hill's* debt and the costs of the winding-up, and some of them offered to pay their proportion of the debt, but refused to pay any costs, on the ground that the costs had been occasioned by his refusal to accept their offer in December, 1861.

In November, 1863, the bill in this suit was filed in the names of the *Cardiff Company*, and *Hill* and *Miller* as official liquidators, against all the contributories, except *Hill*, and the *Crown Company*, praying that it might be declared that the 950 shares in the *Crown Company* were assets for the payment of the debts of the *Cardiff Company* and the costs of the winding-up, and that the shares might be transferred to the official liquidators (*Hill* offering so to transfer his shares), or that they might be sold and the proceeds paid to the liquidators.

Before the bill was filed, *Ommanney* and some of the other Defendants had sold and transferred their shares in the *Crown Company* to *Hill*, and others had sold their shares to other persons.

Some of the Defendants, by their answers, offered to pay their proportion of *Hill's* debt, but insisted that he ought to pay the costs of the suit.

After the suit was instituted, *Hill* entered into compromises with several of the Defendants, by which, in consideration of money payments at the rate of £1 per share, or the transfer of

(1) 9 L. T. (N. S.) 186; 11 W. R. 1007; 2 N. R. 562.

shares in the *Crown Company* of equal value, he released and indemnified them from all claims by the company, or the liquidators, or himself personally.

The cause now came on upon motion for decree.

Mr. *Selwyn*, Q.C. (with him Mr. *Roxburgh*), for the Plaintiffs:—

When a limited company, with all its shares fully paid up, sells the whole of its property and divides the proceeds among its shareholders, its creditors are entitled to have the proceeds of the sale in the hands of the shareholders applied as assets of the company in discharge of their debts. And this is so, whether such proceeds consist of money, or, as in the present case, of shares in another company. It is, therefore, the right and the duty of the official liquidators to recover these shares from the shareholders, as assets of the company to be administered in the winding-up, and they can only do this by means of a suit in this Court. The institution of this suit was strictly in accordance with the observations of the Lord Chancellor when he discharged the order for a call.

Mr. *Cole*, Q.C., and Mr. *J. Pearson*, for some of the Defendants, who still held their shares in the *Crown Company*, and Mr. *Lindley*, for the Defendant *Ommanney*:—

If the company had sold its property with a view of defrauding its creditors, the creditors might have had a right to go against the proceeds of the sale, after such proceeds had been divided among the shareholders. But the sale here was a *bonâ fide* transaction, and all parties supposed that £1750 would be sufficient to pay all the debts of the company. Moreover, *Hill*, who is now the only creditor, is precluded from disturbing an arrangement, in the making of which he himself, as a director of both companies, took a leading part. But whatever may be the rights of creditors, the company, who are the Plaintiffs in this suit (the official liquidators having no power to sue except in the name of the company), are bound by the deed of October, 1860, under which deed the shares in question were to be divided among the shareholders.

Assuming the shares to be assets of the company, the proper means of recovering them is by proceeding in the Court of

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Bankruptcy; that Court has full jurisdiction over the Defendants, as contributories, and is required by the 75th section of the *Joint Stock Companies Act*, 1856, to cause the assets to be collected. No relief can be obtained in this suit against *Ommanney* and the other Defendants who sold their shares in the *Crown Company* before the suit was instituted, and therefore the Court is not in a position to do equal justice between all the Defendants. The Plaintiff *Hill*, by releasing some of the Defendants, has precluded himself from prosecuting the suit against the others: *Attorney-General* v. *Dew* (1). As this suit is virtually a suit by *Hill* to obtain payment of a debt, which was tendered to and refused by him before the winding-up, and the costs of the winding-up, which have been incurred in consequence of such refusal, he must pay the costs of the suit.

Mr. *Currey*, for the *Crown Company*

Mr. *Selwyn*, in reply:—

After a company has been ordered to be wound up, individual creditors cannot sue to recover the assets of the company, but the official liquidators are bound to get in the assets for the benefit of the creditors and contributories. This Court cannot go into the questions of the necessity for the winding-up, or the sufficiency of the tender previously made to *Hill;* the only question is, whether the shares in the *Crown Company* are assets of the *Cardiff Company*. The Court of Bankruptcy has no jurisdiction to compel the Defendants to restore the assets of the company; it can only direct proceedings to be instituted in equity for that purpose. As regards the shares which were sold before suit, though the shares themselves cannot be recovered, the Defendants who sold them must account for the purchase-money, which is just as much the property of the company as the shares. The fact, that the Plaintiff *Hill* has personally compromised with some of the Defendants does not affect the right to recover the assets of the company from the others; the only effect of it will be that in the winding-up he will have to account for what would have been recovered from those whom he has released.

(1) 3 De G. & Sm. 488.

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July 9. LORD ROMILLY, M. R., after stating the facts of the case, continued:—

Upon the best consideration I can give to this case, I am of opinion that the case of the Plaintiffs fails, and that the reasons which were given by the Lord Chancellor for discharging the order of the Commissioner making a call upon the contributories apply equally to the present suit. The Defendants have taken shares in a limited company, and have paid up the full amount of their shares. It is said that the shares taken by them in exchange from the *Crown Company* belong to, and form part of, the assets of the *Cardiff Company*. If this be so, the proper mode of getting at the assets of the company, in the hands of contributories, is by a proceeding in the Court in which the company is being wound up. The Lord Chancellor has held that the contributories are not liable; and if they are not liable in a proceeding under the winding-up in the Court of Bankruptcy, I am at a loss to conceive how the matter can be mended by the institution of a suit in this Court. The contributories are subject to the jurisdiction of the Court of Bankruptcy, and it is difficult to understand how a company which is in course of being wound up can file a bill against its contributories, as a body, to compel them to contribute towards the payment of the debts of the company. The remedy (if any) is in bankruptcy, but the Lord Chancellor has decided that no case has been made out for relief in bankruptcy in this instance, and the rights and equities must be the same, in my opinion, in whatever Court the proceedings may be taken.

When this case is stripped of all technicalities, and of the arguments founded on the course of procedure, it amounts in reality to this, and nothing more than this, that the Plaintiff *Hill* has instituted proceedings for the payment of a debt due to him. Considering it in that point of view, and assuming that the Defendants were liable to pay this debt, it is obvious that the Plaintiff would not be entitled to any decree, even if no proceedings had been instituted in bankruptcy, unless upon payment of costs, inasmuch as a larger sum than that due to him was offered to him before any proceedings whatever were taken. On the 3rd of December, 1861, £426 was offered to him, besides £50 for costs. He refused

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this offer, though it afterwards turned out that £411 was the amount due to him; and in order to enforce his claim, he first caused the company to be wound up in bankruptcy, and then he filed this bill. The result has been, that he has been able to effect compromises with several of the contributories, and this will, to some extent, diminish the amount due to him; but the circumstances I have mentioned would prevent him from recovering any costs, and, indeed, would make him liable to pay the costs which have been occasioned by his refusal of the offer. The Defendants, by their answer, have again offered to pay their proportion of the debt due to *Hill*, and at one time I thought that I might deduct that proportion from the costs which he would have to pay; but he himself, by purchasing the shares of *Ommanney* and others, and by compounding with several of the Defendants, has made it a difficult and expensive matter to ascertain what that proportion is. As he has occasioned the whole expense which the Defendants have been put to, both in the winding-up and in this suit, by refusing their offer in December, 1861, of more than the full amount to which he was entitled, I am of opinion that they are entitled to insist on every possible defence to this suit.

I am of opinion that the suit is defective in form and substance, and that the bill must be dismissed with costs against all the Defendants, to be paid by the Plaintiff *Hill* personally.

Solicitors for the Plaintiffs: Messrs. *Marshall, Westall, & Roberts.*
Solicitors for the Defendants: Messrs. *J. W. & W. Flower.*

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In re JOINT STOCK DISCOUNT COMPANY.

SHEPHERD'S CASE.

Winding-up—Contributory—Transfer of Shares—Registration.

Where the articles of association of a company provided that the company might decline to register any transfer of shares made by any member in any case where the directors considered that the transfer was made for purposes not conducive to the interests of the company, the directors having passed a resolution that no transfers then in the office should be registered without their express sanction,—a transfer of shares then lodged at the office, duly executed by a shareholder, whose calls were paid, and by the transferee, who

was a responsible person, was not registered. An order was shortly afterwards made for winding-up the company:—

Held, that the directors were not bound to register the transfer, and that the transferror was properly placed on the list of contributories.

Appl 14 W 315 4 N C 270 2 De G & Sm 16

THIS was an application on behalf of *James Shepherd*, made under s. 35 of the *Companies Act*, 1862, that the name of *J. B. Higgs* might be placed on the list of contributories of the *Joint Stock Discount Company, Limited*, instead of *James Shepherd*. On the 16th of December, 1865, *Shepherd*, being the registered holder of five shares in the company, sold them to *Higgs*, and executed a transfer in the usual form, which was also executed by the transferree.

On or before the 3rd of March, 1866, the transfer was lodged at the office for registration.

At a special meeting of the directors, held on the 3rd of March, it was resolved "that no transfers of shares now in the office be registered without the express sanction of the board except to the new directors."

On the 5th of March a meeting of the company was held, when it was resolved that a petition be presented to wind up the company. The petition was presented on the 7th of March, and on the 17th of March a winding-up order was made.

The articles of association contained the following clauses relating to the transfer of shares:—

Clause 8. "The instrument of transfer of any share in the company shall be executed both by the transferror and transferree, and the transferror shall be deemed to remain a holder of such share until the name of the transferree is entered on the register book in respect thereof."

Clause 10. "The company may decline to register any transfer of shares made by any member who is indebted to them for any money then due, or who may be solely or jointly liable to them for any call or interest thereon, or in respect of any bill, note, security, or advance, notwithstanding that the same may not be then due, or in any case where the directors consider the transferree to be an irresponsible person, or that the transfer is made for purposes not conducive to the interests of the company."

The transfer in question was never registered, and the official liquidator declined to allow it.

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. There were no calls unpaid at the date of the transfer, and it was not alleged that *Shepherd* was indebted to the company, or that *Higgs* was an irresponsible person.

The case came before the court on an adjourned summons.

Mr. *Baggallay*, Q.C., and Mr. *J. N. Higgins*, for the applicant:—

The transfer of the shares was perfectly *bonâ fide*, and was a completed transaction as far as the transferror and transferree were concerned before any step was taken to wind up the company, and it cannot be affected by the mere omission on the part of the directors of a formal act in the office of the company, for which neither transferror nor transferree were responsible. Besides, the directors had no right to pass a general resolution that no more transfers should be registered. The objection to be valid must be a personal objection to the transferree, who is not alleged in this case to be an irresponsible person, or must be made on the ground that the transfer in question is not conducive to the interests of the company. But this was not the reason of their refusal. The transfer was a good one, and the name of Mr. *Shepherd* should be removed from the list of contributories.

Mr. *Jessel*, Q.C., and Mr. *Roxburgh*, for the official liquidator:—

The directors were justified in passing the resolution that no more transfers should be registered, because they thought it not conducive to the interests of the company that there should be any change in the state of things in which the company was then placed. The official liquidator has the same option which the directors had, and is entitled to retain Mr. *Shepherd's* name on the list.

Mr. *Cole*, Q.C., and Mr. *Locock Webb*, for the transferree.

Mr. *Baggallay*, in reply.

LORD ROMILLY, M.R.:—

I think I cannot put Mr. *Higgs* upon the register. I am of opinion that the directors had the power, if they exercised it *bonâ*

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fide, and considered it to be for the benefit of the company, to refuse to make the transfer, or to refuse to make any transfer, or any number of transfers, and they had a right to enforce their resolution if made *bonâ fide*, believing that it was not desirable that any new transfer of shares should be entered. That being so, I am of opinion that the official liquidator had no power afterwards to put anyone else upon the list of shareholders. He was bound to take the register exactly as he found it, and he could not afterwards alter the state of the register. The directors have clearly a discretion under the 10th clause, although possibly you might have obtained some compulsory order upon them if the company had been going on to compel them to put the name upon the register, or to shew some sufficient cause for not doing so; but unless such an order was obtained, and if they acted *bonâ fide*, and not capriciously, you would be bound by their act. In this case I am of opinion that they were justified in the course which they adopted, and that I cannot alter the register as proposed.

Solicitors for the Applicant and the Transferree: Messrs. *Harrison & Lewis.*

Solicitors for the Official Liquidator: Messrs. *Lawrance, Plews, & Boyer.*

In re GENERAL INTERNATIONAL AGENCY COMPANY.

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CHAPMAN'S CASE.

Winding-up—Contributory—Qualification of Director.

Where a director of a company had signed the articles of association, which required as the qualification of a director that he should hold twenty-five shares, and had applied for that number of shares, and attended several meetings of the board, but retired from the direction before the allotment of shares took place, and the directors afterwards refused to allot him any shares, and returned the deposit:—

Held, that he was not liable as a contributory on the winding-up of the company.

THIS was an application on behalf of *Abel Chapman*, that his name might be removed from the list of contributories of the

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General International Agency Company, Limited, except as the holder of one share.

The company was formed in 1863, and *Chapman* signed the memorandum of association as a subscriber for one share. He also signed the articles of association, in which his name appeared as one of the first directors, and which contained the following provisions:

"An application for shares in the company, followed by an allotment of any shares therein, shall be an acceptance of shares by the allottee of the shares allotted to him, and shall constitute him a member of the company, and entitle him to be placed on the register of members.

"The qualification of a director shall be the holding of twenty-five shares in his own right."

Chapman applied for the allotment to himself of twenty-five shares.

The articles of association were submitted to a meeting of the board on the 12th of February, 1864, at which *Chapman* was present. He also attended several other meetings down to the 8th of April following.

On the 13th of April *Chapman* wrote to the secretary resigning his seat at the board.

At a meeting of the directors, held on the following day, it was resolved that the allotment of the shares be proceeded with, and that the names therein mentioned be included in such allotment; also that cheques be drawn for the amounts of the deposits of those to whom shares had not been allotted, to be forwarded to them with letters of regret. At this meeting *Chapman's* resignation was received, and no shares were allotted to him.

On the 16th of April the secretary wrote to *Chapman* that the directors were unable to allot him the shares for which he had applied.

The company was being wound-up under an order of this Court, and the Chief Clerk, in settling the list of contributories, included *Chapman* as the holder of twenty-five shares.

The case came before the Court on an adjourned summons.

Mr. *E. Charles*, in support of the application:—

In this case there was no binding agreement on the part of

Chapman to accept shares, and no shares were allotted to him. The case is governed by *Ex parte Marquis of Abercorn* (1); by *Ex parte Stock* (2); and by *Ex parte Tothill* (3). On the authority of these cases, though he was for a time a director, he is entitled to be relieved from liability except as to one share.

Mr. *Southgate*, Q.C., and Mr. *Brooksbank*, for the Official Liquidator:—

The applicant's name is properly placed on the list of contributories. He has acted as a director of the company, and shareholders were induced to take shares on the faith of his name appearing on the direction, so that he cannot escape his liability. He made an application for shares, and there is no evidence that he withdrew it.

Lord Romilly, M.R.:—

I do not see how I can distinguish this case from *The Marquis of Abercorn's Case* (4). When that case came before me I considered that when a man allowed his name to be used as a director he was estopped from disputing his liability, but the Lords Justices thought differently; and the case having been compromised before the appeal to the House of Lords came on for hearing, I am bound by the decision of their Lordships.

In the present case, if the shares had been allotted to *Chapman*, even if he had repudiated them, I should have held that he was bound; but the company refused to allot them to him, and paid back the deposit. His name, therefore, must be removed from the list of contributories except as the holder of one share. No costs can be allowed.

Solicitors for the Applicant: Messrs. *Sewell, Sewell, & Edwards.*
Solicitor for the Official Liquidator: Mr. *A. Pulbrook.*

(1) 10 W. R. 548.
(2) 12 W. R. 994.
(3) 14 W. R. 153.
(4) 10 W. R. 451, 548.

M. R.

1866

June 27.

ATKINSON *v.* MACKRETH.

Partnership—Business of Solicitor—Joint and Several Liability—Pleading—Parties.

Where one of a firm of solicitors received from a client a sum of money for which a receipt was given in the name of the firm, stating that part of the money was in payment of certain costs due to the firm, and that the residue was to make arrangements with the client's creditors, and the solicitor misappropriated the money:

Held, that the transaction with the client was within the scope of the partnership business; and that the partners in the firm were jointly and severally liable to make good the amount:

Held also, that all the partners were necessary parties to a suit for that purpose.

5 Eq 185 — 188
3 Ch 649.
7 Eq 509
8 Eq 539
18 Eq 622-627
24 L D 732
25 L D 150

DEMURRER. The bill stated that the Defendant *William Mackreth* and one *Tucker* carried on business in partnership as attorneys and solicitors under the firm of *Gibbs, Tucker, & Mackreth;* that the Plaintiff retained and employed *Tucker* and the Defendant to act as his solicitors with respect to certain matters of business, and particularly to negotiate terms of arrangement and composition with certain of his creditors; that *Tucker* and the Defendant, acting as such solicitors, procured an advance to be made to the Plaintiff by one *Mawson* of £500, on the security of certain property of the Plaintiff; that their professional charge in respect of this advance was £20, which sum the Plaintiff paid on the 15th of August, 1865; that *Tucker* and the Defendant acted as attorneys for the Plaintiff in an action brought against him by one *Balch* on a bill of exchange; that on the 17th of August, 1865, the Plaintiff paid to *Tucker*, on behalf of the Defendant *Mackreth* and the partnership firm, the sum of £200, for which a receipt was sent to the Plaintiff in the following terms:—

"Received the 17th day of August, 1865, of *J. R. W. Atkinson*, Esquire, the sum of £220, £20 part thereof being our costs and charges relative to the mortgage of *Atkinson* to *Mawson*; £22 0*s.* 2*d.* being the balance of debt and costs due to Plaintiff in *Balch* v. *Atkinson*; £5 to re-pay loan 21st July; and £172 19*s.* 10*d.*, being

the balance of the sum of £220, amount to make arrangements with your creditors.

"*Gibbs, Tucker, & Mackreth.*"

That *Tucker* appropriated the money to his own use, and had absconded, and was now resident out of the jurisdiction. It prayed for an account, and that the Defendant might be declared personally liable to make good to the Plaintiff the amount which should be found due to him on taking such account.

The Defendant demurred for want of equity, and also, *ore tenus*, for want of parties.

Mr. *A. E. Miller*, for the demurrer:—

One partner is liable for the acts of another only when the latter is acting within the scope of the partnership business. Now it has been laid down that where a sum of money is given to one of two solicitors in partnership to be invested in a *specific* security, that is within the scope of the partnership business. It is also laid down, in *Blair* v. *Bromley* (1), that if one partner has represented that money paid to him has been laid out in a particular manner, the client is entitled to deal with the firm on the faith of that representation, and here, if *Tucker* had stated that he had applied the money in paying the Plaintiff's creditors, and rendered an account accordingly, the Defendant would have been bound. But the money was simply given to effect a compromise with the Plaintiff's creditors: that is analogous to the case where money is handed to a solicitor for investment generally; and it has been repeatedly held that that does not fall within the scope of a solicitor's business: *Harman* v. *Johnson* (2); *Bourdillon* v. *Roche* (3); *Bishop* v. *Countess of Jersey* (4); *Ex parte Dufaur* (5). At all events no relief can be given in the absence of *Tucker*.

Mr. *Jones Bateman*, for the bill, was called on as to the second point only:—

This is a case of joint and several liability, and the Plaintiff may sue both or either of the partners. In none of the cases cited was the defaulting partner made a party to the suit.

(1) 2 Ph. 354.
(2) 22 L. J. (Q. B.) 297.
(3) 27 L. J. (Ch.) 681.
(4) 2 Drew. 143.
(5) 2 D. M. & G. 246.

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[Mr. *Kay, amicus curiæ,* referred to Cons. Ord. VII. r. 2: *Coppard* v. *Allen* (1).]

LORD ROMILLY, M.R.:—

This demurrer must be overruled in so far as it says that no case is made out by the bill for a decree; for the case is clearly one which binds both partners. The facts stand thus:—The Plaintiff's solicitors obtain a loan for him, in respect of which transaction they have a bill of costs, which he pays on the 15th of August. They also act as his attorneys in defending an action brought against him on a bill of exchange, and they lend him a small sum. One of the partners undertakes to effect a compromise with the Plaintiff's creditors, and receives £200 from the Plaintiff, and a receipt is given in the name of the firm, which is as follows: [His Lordship read it.]

I am of opinion that both partners must be taken to have had knowledge that the money was so to be applied, and that this was an undertaking by the firm so to apply it. It is not possible to say that if one member of a firm of attorneys receives a sum of money from a client, and applies part of it in the payment of the costs due from that client to the firm, and undertakes to apply the rest in compromising the client's debts, this undertaking so to apply the balance is not within the scope of attorneys' business, so as to enable the other partners to repudiate that part of the transaction. There is therefore a joint and several liability; but the relief cannot be given in the absence of *Tucker.* The demurrer, *ore tenus,* must therefore be allowed, but without costs.

Solicitor for the Plaintiff: Mr. *J. J. Darley.*
Solicitors for the Defendant: Messrs. *Rooks, Kenrick & Crook.*

(1) 2 D. J. & S. 173.

SAUNDERS *v.* MILSOME.

M. R.
1866
July 28.

Debtor and Creditor—Specialty Debt—Acknowledgment of Debt by Deed—Agreement under Seal to execute Mortgage.

A. being indebted to *B.* on simple contract, gave a promissory note for the amount, and executed a deed by which, after reciting the debt and the note, he, as further security, charged certain property with the payment of it, and agreed to execute such a mortgage of the property, with all powers, covenants, and clauses incidental thereto, as *B.* should require:—

Held, that the deed converted the debt into a specialty debt.

THIS was a summons adjourned from Chambers, taken out by a creditor to vary the Chief Clerk's certificate in an administration suit, so far as it certified the debt of the applicant to be a simple contract debt.

On the 15th of February, 1853, *Thomas Milsome*, the testator in the cause, owing his bankers, Messrs. *Bulpett, Mulcock, & Dunn*, £1187 2*s.* 6*d.*, gave them his promissory note for that sum, and at the same time executed an agreement under seal in the following terms:—

"Memorandum.—Whereas, there is now due and owing from me, the undersigned, *Thomas Milsome*, of *Sutton Scotney*, in the county of *Southampton*, maltster, to Messieurs *Bulpett, Mulcock, & Dunn*, of the city of *Winchester*, bankers, for moneys advanced and paid by them to me, and for and on my account, the sum of £1187 2*s.* 6*d.*, for which said sum I have this day given to the said Messieurs *Bulpett, Mulcock, & Dunn*, my promissory note, payable on demand, with interest at £5 per centum per annum, And as a further security, I hereby agree to charge, and do hereby charge, all my individual estate and interest, of whatever description, that I now am or may be entitled to under the will of my late uncle, Mr. *William Milsome*, of *Kingsclere*, in the said county of *Southampton*, gentleman, deceased, with the payment to the said Messieurs *Bulpett, Mulcock, & Dunn*, or other the partners for the time being of the said firm, of the said sum of £1187 2*s.* 6*d.*, and interest, as aforesaid. And I hereby also agree to execute such a mortgage of such my estate and interest under the said

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will, including a power of sale, and all other powers, covenants, and clauses incidental and necessary thereto, in default of payment, as I may be at any time required to do by the said Messieurs *Bulpett, Mulcock, & Dunn,* or other the partners for the time being of the said firm as aforesaid, and which may be by them tendered to me for execution."

The debt was now vested in *Bulpett* alone, who had come in and proved it under the decree, and who took out this summons.

The question was, whether this deed made the debt of £1187 2*s.* 6*d.* a specialty debt.

Mr. *Hemming,* for the applicant:—

The acknowledgment of a debt by an instrument under seal converts it into a specialty debt, if the purpose of the deed is to acknowledge the debt. The form of the deed is immaterial; all that is necessary to constitute a specialty debt is that it should be evidenced with the solemnity which the law attaches to a sealed instrument. In *Turner* v. *Wardle* (1) a trustee having borrowed the trust fund, and executed a deed-poll acknowledging the debt, the *cestuis que trust* were held to be his specialty creditors. But even if the acknowledgment alone is not sufficient, the agreement to execute a mortgage with the covenants and clauses incidental thereto, which implies a covenant to pay the mortgage debt, converted the debt into a specialty debt.

Mr. *Schomberg,* for the Plaintiff, a specialty creditor of the testator:—

A deed executed for the purpose of acknowledging a debt creates a specialty debt; but where the object of the deed is to give a security for the debt, and the amount of the debt is recited for the purpose of ascertaining what it is for which the security is given, such recital, being merely collateral to the real object of the deed, does not alter the character of the debt: *Marryat* v. *Marryat* (2); *Courtney* v. *Taylor* (3). As to the agreement to execute a mortgage, a covenant to pay the money, though usually inserted in a mortgage deed, is no part of the mortgage: *Woodford* v. *Charnley* (4); and the Court will not imply such a covenant,

(1) 7 Sim. 80.
(2) 28 Beav. 224.
(3) 6 Man. & G. 851.
(4) 28 Beav. 96.

especially where a promissory note has been given at the same time.

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Mr. *Begg*, for the Defendant, the executrix.

LORD ROMILLY, M.R.:—

I think this is a specialty debt. I adopt the distinction stated by Mr. *Schomberg*, which was clearly pointed out in *Courtney* v. *Taylor* (1), and acted upon by me in *Marryat* v. *Marryat* (2). If a debtor executes a deed by which he admits the debt, and then conveys property to a trustee upon trust to sell and pay the debt out of the proceeds, that does not make the debt a specialty debt; but if by the deed he not only admits the debt, but agrees that if it is not paid before a certain time he will pay it, that clearly creates a specialty debt. The instrument in the present case contains first a recital of the debt, then a charge upon a particular property, and then an agreement to execute such a mortgage of the property, including all powers, covenants, and clauses, incidental and necessary thereto, in default of payment, as the creditor should require. Such a mortgage would contain a covenant for payment of the debt. Therefore this deed contains an agreement to give a security which would create a specialty debt, and that being so, I am of opinion that it has converted the debt into a specialty debt, and that the certificate must be varied accordingly.

Solicitors for the Applicant: Messrs. *Young & Jacksons.*
Solicitor for the Plaintiff: Mr. *Mackrell.*
Solicitor for the Defendant: Mr. *J. E. Fox.*

(1) 6 Man. & G. 851. (2) 28 Beav. 224.

M. R.
1866
July 27.

In re JOYCE'S ESTATE.

Trustee Act, 1850—*Bankruptcy Act*, 1861, *s.* 110—*Assignee in Bankruptcy.*

After a bankruptcy, and the appointment of assignees, the proceedings were suspended under the 110th section of the Act of 1861, reserving the rights and jurisdiction of the assignees, and the Court:—

Held that one of the assignees who had gone abroad was a trustee within the meaning of the *Trustee Act*, 1850.

THIS was a petition under the *Trustee Act*, 1850, for an order vesting real estate of a bankrupt, one of whose assignees had resigned his office and was out of the jurisdiction of the Court, in the remaining assignees.

The bankrupt, *Charles Joyce*, was adjudicated bankrupt in May, 1865, and in the following June, *Astley*, *Oppenheim*, and *Cameron*, were appointed creditors' assignees of his estate. At the date of the bankruptcy *Joyce* was entitled to certain lands in reversion in fee simple, expectant on the death of his wife. At a meeting of the creditors in August, 1865, it was resolved, under the 110th section of the *Bankruptcy Act*, 1861, that the proceedings in bankruptcy should be suspended, and that the estate should be wound up and administered by the assignees out of bankruptcy in like manner (so far as the difference in circumstances would admit), as it would have been wound up if the proceedings in bankruptcy had not been suspended; but not so as to deprive the Court or the assignees or creditors of any jurisdiction or right which it or they possessed under the *Bankrupt Law Consolidation Act*, 1849, or the *Bankruptcy Act*, 1861.

In November, 1865, *Cameron*, one of the assignees, resigned his office, and soon afterwards went to live in *Australia*. His resignation was accepted in May, 1866, at a meeting of the creditors called for the purpose under the 124th section of the *Bankruptcy Act*, 1861.

In January, 1866, *Joyce* having obtained his discharge, the assignees sold him the reversion in the land, and before any conveyance was made, *Joyce* resold it to *Richard Aston*.

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The Petition, the object of which was to get in the legal estate vested in *Cameron* by his appointment as assignee, was presented by *Joyce* and the two remaining assignees, *Astley* and *Oppenheim*.

Mr. *Jessel*, Q.C., and Mr. *Lawrance*, for the Petitioners, submitted that the assignees were seised of the property upon a trust, within the meaning of the *Trustee Act*, 1850.

Mr. *Waller*, for the sub-purchaser.

LORD ROMILLY, M.R., held that the assignee was a trustee within the meaning of the Act, and made the order.

Solicitors for the Petitioners: Messrs. *Lawrance, Plews, & Boyer.*

Solicitor for the Respondent: Mr. *Tarrant.*

See *Ex parte Daniell*, 3 M. D. & D. 612.

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M. R.
1866
June 6, 7

Debtor and Creditor—Assignment for Benefit of Creditors—Unclaimed Dividends—Resulting Trust.

Where an assignment is made for the benefit of creditors, those creditors who have received dividends out of the property assigned are, in the absence of any stipulation to the contrary, entitled to any unclaimed dividends in the hands of the trustees, in preference to the trustees and, *semble*, also to the original debtor.

1 Ch. P. 24
4 Ch D 763
770

BY a memorandum in writing, dated the 7th of November, 1799, the several persons whose names were thereunder written, creditors of *Charles Bunyon*, then carrying on business as a brandy merchant in London, agreed to accept a composition of 15*s.* in the pound on their respective debts, and in full thereof, such composition to be paid and secured as therein mentioned; and it was agreed that a conditional engagement should be entered into by the said *Charles Bunyon* with *John Wild*, *Thomas Plummer*, and *Charles Stuart*, as trustees for the benefit of themselves and the

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rest of the said *Charles Bunyon's* creditors, that in case the sum of £2000 and upwards claimed by the said *Charles Bunyon* as a debt due to him from one *Timothy Surr*, and which was contested, or any part thereof, should be recovered and received by the said *Charles Bunyon*, he, the said *Charles Bunyon*, would pay into the hands of the said *John Wild*, *Thomas Plummer*, and *Charles Stuart*, such sum of money as should be so received for the benefit of the creditors, who should come into and accept the benefit of the said agreement in proportion to their several debts; but in case it should appear to the satisfaction of the said *John Wild*, *Thomas Plummer*, and *Charles Stuart*, that the then estate and effects of the said *Charles Bunyon* should not be sufficient to enable him to pay the full amount of the said composition of 15*s.* in the pound, then the said trustees were to be at liberty to apply such part of the money so to be received from the said *Timothy Surr*, as they in their discretion should think fit, in aid of such deficiency; and, upon such securities and engagement being given, the said creditors agreed severally to execute a general release to the said *Charles Bunyon* of all claims and demands they had upon him up to the date of the said agreement.

By an indenture dated the 7th of January, 1800, and made between *Charles Bunyon* of the first part, the said *John Wild*, *Thomas Plummer*, and *Charles Stuart*, on behalf of themselves and the rest of the creditors of the said *Charles Bunyon* of the second part, and the several other persons, creditors of the said *Charles Bunyon*, whose hands and seals were thereunto set and subscribed, of the third part, and which was executed in pursuance of an agreement in that behalf contained in the memorandum of the 7th of November, 1799; *Charles Bunyon* covenanted with the said *John Wild*, *Thomas Plummer*, and *Charles Stuart*, that, in case the said sum of £2000 and upwards, or any part thereof, should be recovered and received by the said *Charles Bunyon*, then he, the said *Charles Bunyon*, would pay into the hands of the said trustees, on behalf of themselves and the rest of the creditors of the said *Charles Bunyon*, whose hands and seals were thereunto set and subscribed, the whole and full sum of money which should be so recovered and received for the benefit of the said creditors, in proportion to their several and respective debts, over and above the said composition of 15*s.* in the

pound, but subject, nevertheless, to the discretionary powers by the memorandum vested in the said trustees of applying part thereof in aid of the said composition; and the creditors thereby released the said *Charles Bunyon* from all demands which they respectively had against him at the date of the said agreement.

The composition of 15*s.* in the pound was duly paid. Many years after the date of the deed of 1800 a portion of the debt therein mentioned was recovered, and in 1838 a dividend of 1*s.* 2¼*d.* in the pound was paid thereout to such of the creditors of *Charles Bunyon* as could then be found. At this time all the original trustees were dead, *Charles Stuart* having survived his co-trustees. There was no power in the deed to appoint new trustees, and *John Wild*, *John Plummer*, and *Samuel Stuart*, respectively sons of the original trustees, had taken upon themselves to act in the trusts thereof.

By an indenture dated the 23rd of April, 1838, and made between the creditors who had received a dividend of the first part, and *John Wild* (the son), *John Plummer*, and *Samuel Stuart* of the second part, the parties thereto of the first part released the said *John Wild*, *John Plummer*, and *Samuel Stuart*, and the real and personal representatives, estate and effects, of the original trustees, from the dividends so paid, and from all dividends which the said *John Wild*, *John Plummer*, and *Samuel Stuart*, or the survivors or survivor of them, or the executors or administrators of such survivor, might retain and appropriate, or apply to or for any other persons or purposes pursuant to the power thereinafter contained; and from the sum of £27 3*s.* 6*d.*, being the surplus which would remain after paying a dividend of 1*s.* 2¼*d.* in the pound to all the creditors who subscribed or acceded to the deed of 1800. And it was thereby agreed that it should be lawful for the said *John Wild*, *John Plummer*, and *Samuel Stuart*, or the survivors or survivor of them, and the executors, administrators, or assigns of such survivor, at their or his uncontrolled discretion, to pay the said dividend of 1*s.* 2¼*d.* in the pound on certain debts therein specified (being debts of creditors who had not then been found), upon such evidence as they should think proper, or to refuse to pay the same; and to retain all or any of the dividends which they or he should so refuse to pay, and to appropriate or apply the same to and for

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such persons and purposes, and in such manner, as they or he should think fit, without any liability to account for the exercise of all or any of the said discretionary powers or authorities, anything thereinbefore contained to the contrary notwithstanding.

After paying the above-mentioned dividend a considerable sum remained in the hands of the trustees, in respect of dividends payable to creditors who had not been found. This sum was now represented by £625 New £3 per cent. Reduced Annuities, standing in the name of the Defendant *Banning*, the legal personal representative of *Samuel Stuart*, who survived *John Wild*, the son, and *John Plummer*. It did not appear who was the legal personal representative of *Charles Stuart*.

The bill was filed by *William Wild*, the son of *John Wild* the son, on behalf of himself and of all other persons entitled to the benefit of the indenture of the 7th of January, 1800, against *Banning*. The Plaintiff claimed to be entitled to the benefit of the indenture in respect of a debt due to *John Wild*, the original trustee. A dividend on this debt had been received in 1838 by *John Wild*, the son, and the Plaintiff; and the deed of 1838 had been executed by them.

The bill prayed that the trust funds standing in the name of the Defendant might be applied and disposed of under the direction of the Court, and that the persons entitled thereto might be ascertained and declared, and that the trust funds, subject to the payment of the costs of the suit, might be applied in payment of a second dividend on the debts mentioned in the schedule to the deed of the 23rd of April, 1838, to the persons entitled to such debts, or such of them as could be ascertained.

Mr. *Southgate*, Q.C., and Mr. *Robson*, for the Plaintiff:—

Under the original deed the creditors are entitled to the whole trust fund, to the exclusion of the original settlor and the trustees: *Joel* v. *Mills* (1); *Williamson* v. *Naylor* (2). The release of 1838 extends only to funds applied or appropriated in pursuance of the power therein contained. There has been no appropriation of the fund in question, and the trustee cannot be allowed to retain it for himself.

(1) 3 K. & J. 458. (2) 3 Y. & C. Ex. 208.

Mr. *C. T. Simpson* (Mr. *Baggallay*, Q.C., with him), for the Defendant:—

The trusts of the deed of 1800 are for the benefit of the creditors, in proportion to the debts claimed by them. The creditors are therefore *cestuis que trust* as tenants in common; each is entitled to an aliquot share of the fund, and no more. If any creditor cannot be found, his share may enure, by way of resulting trust, for the benefit of the original debtor, but cannot belong to his fellow-creditors; at all events, in order to argue that question, the representatives of the original debtor ought to be here. It may also be that the trustees are entitled for their own benefit, as was held in *Burgess* v. *Wheate* (1): in that case the trustees would take the fund as joint tenants, and the representative of *Charles Stuart*, who survived his co-trustees, would be entitled to the whole.

Williamson v. *Naylor* (2) was the case of a will, and turned on the testator having revived certain debts *quoad* a particular fund, and it was decided that these debts, being revived, must be paid in full.

He also argued that the deed of 1838 was an absolute release of all claim to the fund by the Plaintiff, in favour of the then trustees and the survivor and survivors of them.

Mr. *Southgate*, in reply:—

The deed of 1838 only releases the trustees from dividends paid away; but this fund has not been paid away. As to there being a resulting trust in favour of the debtor, *Williamson* v. *Naylor* decides the contrary.

June 7. LORD ROMILLY, M.R.:—

On looking over the deeds, which I have very carefully done, I am of opinion the Plaintiffs are entitled to a decree.

In the first place, it appears to me that in cases of this description, in the absence of any provision or direction expressly to the contrary, it is settled by authority, of which I think *Williamson* v. *Naylor* is a distinct proof, that the creditors are entitled to divide

(1) 1 W. Bl. 121. (2) 3 Y & C. Ex. 208.

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amongst themselves, in preference to the trustees, any funds that are not claimed. Of course it is always subject to this, that any persons who have not claimed their money may, if they please, come in at a subsequent time and obtain what they are entitled to. Unquestionably a person may give that away if he pleases, and the construction that has been attempted to be put upon the deed of 1838 is, that the creditors here have intended to give away any right of this description, as a personal benefit vested in them, to the trustees. That is the only way the contention of the Defendant can be supported, if at all. I am of opinion the deed does not bear that construction, and that the only construction it bears is this, that the trustees will be answerable for no misconduct whatever—I do not mean to say they would not be liable for fraud or the like, because that would vitiate everything; but I mean, that in the management and performance of the trust they are entitled to be indemnified for whatever they do, if done *bonâ fide*, and that they would not be answerable for the consequences.

But even if the construction that I am desired to put upon the deed were correct, in my opinion, the fund in hand ought to belong to the three trustees, because I see nothing as between the trustees themselves that entitles any one to say that, so far as regards this interest, it could be held in joint-tenancy, and that the survivor would have the whole. The fact is, this circumstance proves that the matter was not present to the minds of the parties to that deed, and that the deed was not intended to deal with it. If, therefore, the Defendant is entitled to the fund, in my opinion the representatives of the two other trustees would be entitled also. The mere accident of one surviving would not entitle one trustee to take the whole.

I am of opinion, therefore, the Plaintiff is entitled to have it ascertained who are the persons entitled, and for that purpose advertisements may be issued. I am not now going to divide the fund. The money must be transferred into Court, and then there will be an inquiry as to who are the persons entitled to it. I think the costs of all parties must be paid out of the fund.

Solicitors for the Plaintiff: Messrs. *Andrew & Atkins.*
Solicitor for the Defendant: Mr. *E. J. Barron.*

RICH *v.* WHITFIELD.

M. R.
1866
June 26, 27.

Will—Conversion—Trust to invest in Land or Government Securities.

T. devised all his real estate to *S.* for life, with remainder to the children of *S.*, in tail, with remainders over, and bequeathed personal estate on corresponding trusts; and he directed his trustees to sell a specific freehold estate, and to invest the proceeds in the purchase of lands in certain counties, or in Government securities, to be settled and assured to and for the like uses and trusts as his real and personal estate were settled, devised, and limited. The trustees, in 1805, sold the freehold estate, and invested the purchase-money in Government securities, and allowed it to remain so invested until the death of *S.* in 1863. *S.* had only one child, who was born and died in 1810:—

Held, that the Government Annuities vested absolutely in the child of *S.* as personal estate.

THIS was a suit to ascertain the rights and interests of all parties in certain real and personal estate under the wills of *Thomas Whitfield* and *John Whitfield*.

Thomas Whitfield, by his will dated the 22nd of July, 1799, devised all his freehold and leasehold and residuary personal estate to trustees, their heirs, executors, administrators, and assigns, upon trust to permit his wife during her widowhood to receive out of the rents and profits an annuity of £300, and to occupy a house and receive the rents of three fields; and as to the said house and three fields, after the death or second marriage of his wife, and as to the rest of the property, immediately after his own death, to the use of the trustees, their heirs, executors, administrators, and assigns, until his daughter, *Sarah Whitfield*, should attain twenty-one, upon trust to pay her an annuity of £100, and to accumulate the surplus rents, and from and after his daughter's attainment of the age of twenty-one, to the use of his daughter for life, with remainder (after an intermediate limitation which did not take effect) to the use of a trustee for the term of 500 years upon trusts for raising portions for the younger children of his daughter; with remainder to the use of the first and other sons of his daughter successively in tail; with remainder to the use of all and every the daughter and daughters of his daughter in tail,

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if more than one as tenants in common, with cross-remainders in tail; with remainder to the use of his widow during her widowhood; with remainder to the use of his brother, *John Whitfield*, in fee. And he declared that his trustees should stand possessed of his leasehold and personal estates upon the same trusts, and to and for the same uses, ends, intents, and purposes, and that the same should be held and enjoyed by the same persons as were thereinbefore expressed and declared with regard to his freehold estates, or as near thereto as the nature and quality of the estate and the law would admit. And he declared that if his trustees and his wife should conceive it eligible to carry on the cotton-spinning business in which he was engaged with his brother, they should do so; but if not, then the trustees should sell, according to his partnership articles, his moiety in certain freehold mills and hereditaments, and in the machinery and implements in the mills; and he directed that the money arising from such sale should be by his trustees laid out in a purchase of lands in *Cheshire* or *Staffordshire*, or in government securities, and be settled and assured to and for the like uses, trusts, and purposes, as his real and personal estates were thereinbefore by him settled, devised, and limited.

Thomas Whitfield died in 1799, and his widow died in 1806. In 1804 and 1805 the trustees sold the testator's moiety of the freehold mills, and invested the purchase-money in £3570 Navy 5 per Cent. Stock (now converted into New 3 per Cent. Annuities), and it remained in that state of investment to the present time.

Sarah Whitfield, the testator's daughter, in 1809 married *Francis Johnson*, whom she survived, and died in 1863. She had one child only, *Frances Whitfield Johnson*, who was born in 1810, and died a few days after her birth. *John Whitfield* died in 1808, having, by his will, dated the 12th of September, 1806, devised and bequeathed all his estate and interest in the property devised and bequeathed by his brother *Thomas*, to trustees upon trust to sell and to divide the proceeds amongst his children and his granddaughter *Amelia*, share and share alike.

One of the questions raised was, whether the £3570 New 3 per Cent. Annuities, was personal estate, and so vested absolutely in *Frances Whitfield Johnson*, or was real estate, and so passed under

the limitations of the will of *Thomas Whitfield* to *John Whitfield*.

Mr. *Selwyn*, Q.C., and Mr. *Chitty*, for the Plaintiff, a son of *John Whitfield's* granddaughter *Amelia*, to whom she had conveyed her interest under his will:—

The Court will never allow trustees to convert real estate into personal, or *vice versâ*, unless the testator has expressly empowered them to do so. *Thomas Whitfield* did not intend to give his trustees a discretionary power of converting any part of his real estate into personalty. He directed them to sell a particular freehold property in a certain event, and pointed out Government securities as a temporary investment until they could find a convenient investment in land in *Cheshire* or *Staffordshire*. The whole scope of the will points to a settlement of real estate, and in the very clause relating to the investment of this money, the words "settled and assured" are only applicable to real estate. The trustees invested the money in Government securities for a time, and postponed the permanent investment in land until there was some person entitled to an estate of inheritance under the will, whom they could consult as to such investment. The mere fact of the length of time during which it has remained in its present state of investment cannot alter the character of the property. There never has been any person capable of electing to take it as personal estate. It therefore remains real estate, and belongs to the devisees of *John Whitfield*.

Mr. *Cole*, Q.C., Mr. *Baggallay*, Q.C., Mr. *Southgate*, Q.C., Mr. *Jessel*, Q.C., Mr. *Lewin*, Mr. *J. Pearson*, Mr. *Cotton*, Mr. *Woodhouse*, and Mr. *Watson*, for other parties claiming under *John Whitfield's* will.

Mr. *Rowcliffe*, for the trustee of *Thomas Whitfield's* will.

Mr. *E. F. Smith*, Q.C. (with him Mr. *Kekewich*), for the personal representative of *Frances Whitfield Johnson*:—

The testator has expressly given to his trustees the option of investing the proceeds of the sale of the mills in land or Government securities, to be settled on the same trusts as his real and

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personal estate. The trustees have chosen to invest in Government securities, and the devolution of the property must be according to its actual state: *Swann* v. *Fonnereau* (1). Upon the birth of *Frances Whitfield Johnson*, it vested absolutely in her as personal estate, subject to the preceding life interests, and her representative is entitled to it.

LORD ROMILLY, M.R.:—

I have come to the conclusion that this property must be treated as personalty. The testator died in 1799, and this property, or the last of it, was realized in 1805; then it was turned into personalty, and then it was invested. The daughter of *Sarah Johnson* was not born till 1810, and she died in a few days after her birth. This property vested in her absolutely in her lifetime; it was her property, subject to the previous life interests. The trustees, previously to her death, had converted it into personalty. Had they any right after her death to invest it in land when it had once become vested in the person who was absolutely entitled to it? I doubt whether they had. At all events they have not done so, and they have allowed it to remain in that state of investment from the death of that child until the time of the filing of this bill, upwards of fifty years; in fact they have allowed it to remain from the time it was originally invested, a period of sixty years, as personal estate. I am of opinion that it must be treated as personal estate, and that in the events which have happened, the personal representative of the child is entitled to it.

Solicitors for the Plaintiff: Messrs. *Hudson & Matthews.*

Solicitors for the Defendants: Messrs. *Symes, Sandilands & Co.*; Messrs. *Davidson, Carr, & Bannister*; Messrs. *Elsdale & Byrne*; Messrs. *Brooks & Du Bois*; Messrs. *Dawes & Son.*

(1) 3 Ves. 41.

SKILBECK *v.* HILTON.

M. R.
1866
July 12, 24.

Release—Fraud—Mistake—Setting aside a Deed.

Where a release in terms extends to sums of money which the releasee has openly, but without justification, taken from the releasor, the latter cannot file a bill in equity to compel the releasee to pay these sums, though at the time the release was given, the releasor was in fact ignorant of the fraud committed by the releasee. The remedy of the releasor in such a case is to have the release set aside *in toto*; and if, in consequence of dealings subsequent to the release, that cannot be done, the releasor can have no relief in equity.

THE Plaintiff and the Defendant carried on business as cotton-spinners at *Manchester*, upon terms contained in a deed of partnership bearing date the 25th of March, 1861. The Defendant resided at *Manchester*, and managed the business. The Plaintiff resided at *Hull*, and to him the greater part of the capital employed in the business belonged. In October, 1864, the Defendant applied to the Plaintiff to make an advance to the firm to enable it to discharge certain liabilities which he represented that the partnership assets were insufficient to meet. The Plaintiff thereupon sent his solicitor, and an accountant, to examine the books and affairs of the partnership. The result of this examination was to shew that the business had for some time been carried on at a loss; that the whole of the capital had been expended; that the assets were barely sufficient to meet the liabilities; and that a balance was due from the Plaintiff to the Defendant. After some discussion between the parties, the Plaintiff filed a bill for the dissolution of the partnership; and on the 22nd of November, 1864, a copy of the bill was sent to the Defendant's solicitors along with the engrossment of a deed of dissolution, and a letter informing them that the Plaintiff would not prosecute the suit if the Defendant would retire from the partnership and execute the accompanying deed.

The Defendant acceded to this arrangement, and executed the deed, which bore date the 29th of November, 1864. By it the Plaintiff and Defendant dissolved their co-partnership, and each of them released the other from all actions, suits, claims, and

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demands, which either of them might have against the other by reason of the co-partnership, or of any covenant or provision in the deed of partnership, or otherwise in relation thereto. And the Defendant assigned all his share and interest of and in the machinery, fixtures, goods, merchandize, stock in trade, credits and effects, belonging, due, and owing to the Plaintiff and Defendant as co-partners, to the Plaintiff, his executors, administrators, and assigns, for his and their absolute use and benefit, and the Defendant also assigned all his share and interest of and in a lease under which the mills, where the business was carried on, were held, unto the Plaintiff, his executors, administrators, and assigns, subject to the payment of the rent and the performance of the lessee's covenants in the said lease contained. And the Defendant thereby, amongst other things, covenanted with the Plaintiff, that he, the Defendant, had not received or discharged any of the credits of the partnership except as appeared by entries duly made in the books of the partnership.

The mills, with the books and accounts, were handed over to the Plaintiff on the 8th of December, 1864; when it appeared from the entries in the books that on the 28th of October, 1864, the Defendant had drawn out £300 for his own use; on the 15th of November, £275; and that he had on the 21st of November paid to his nephew, who was employed in the business, £180. The Court was of opinion on the evidence that there was not the slightest justification for the abstraction or payment of these sums. The entries were made after the books had been examined by the Plaintiff's solicitor and accountant, but before the execution of the deed, and the Plaintiff was entirely ignorant of them when he sent the proposal of the 22nd of November. The books were always open for examination by the Plaintiff.

In February, 1865, the Plaintiff filed the bill in this suit praying that the Defendant might be decreed to pay to the Plaintiff the sums of £300, £275, and £180, together with interest, and that it might be declared that the release contained in the indenture of the 29th of November, 1864, did not extend to those three sums, or any of them. That if necessary for the purposes of the suit the indenture might be set aside and given up to the Plaintiff to be cancelled, and that in that case the partnership between the

Plaintiff and the Defendant might be declared to be dissolved and might be wound up under the direction of the Court.

Subsequently to the institution of the suit the Plaintiff sold the mills and machinery, and realized the partnership assets.

The cause now came on to be heard.

Mr. *Jessel*, Q.C., and Mr. *N. R. Smart*, for the Plaintiff.

Mr. *Baggallay*, Q.C., and Mr. *Little*, for the Defendant:—

By the arrangement the Plaintiff was to take the assets of the partnership as they then stood. Assume that the Defendant had taken a sum which he would not have been allowed in a partnership account taken in this Court. Still the Plaintiff has released him by the deed from all claims and demands whatsoever; and the Plaintiff must either adopt the deed with all its consequences, or else shew that by reason of some fraud or mistake he is entitled to have it set aside. Now there was no concealment on the part of the Defendant in taking these sums; the Plaintiff might have looked at the books; and his carelessness in not doing so would disentitle him to have the deed set aside. But in addition to that he has realized the partnership assets; the parties cannot be restored to the position in which they stood at the time of the execution of the deed, and therefore it cannot be set aside.

Mr. *Jessel*, in reply:—

As to the realization of the assets, the Plaintiff was entitled to do that as a partner without this deed at all; if the Defendant objected to the Plaintiff's proceedings he ought to have filed a cross bill to restrain him.

Again, a release is always limited to what it was intended to cover: *Lindo* v. *Lindo* (1). If there had been no release, these sums would have passed to the Plaintiff as part of the assets of the partnership: all that we wish is to confine the release to what it was meant to be.

The Defendant admits he had not any beneficial interest in the concern; yet he takes upwards of £700 and puts it in his pocket. Under these circumstances it is not for him to speak of the

(1) 1 Beav. 496.

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Plaintiff's negligence, and say that if the Plaintiff had been more careful he might have discovered the fraud. The simple question is, what did the Plaintiff and Defendant agree to? If the Defendant believed that the Plaintiff would have entered into the arrangement knowing of these entries, why did he not tell him?

July 24.—LORD ROMILLY, M.R., after stating the facts continued:—

On going through the evidence I do not find the slightest justification for the abstraction of this sum of money. It is simply £575, to which the Defendant was not entitled, taken out of the assets by the Defendant, and put into his pocket: and £180 paid to his nephew, who was as little entitled to it as he was to the £575.

The first question is, what were the rights of the Plaintiff on the discovery of this fact in December, 1864. I think that the only equity he had was to annul the whole transaction. The agreement was entered into by mistake, in the belief that the books remained as they were when shewn to the Plaintiff's accountant in October previous. There was not any communication of this fact made to the Plaintiff, and though he might have inspected the books, he never did so. But at the same time though the Defendant knew this when he accepted the proposal to execute the deed, he also knew what the state of the books was, he had taken the sums openly, there was no concealment about it, only there was no proclamation of it; and he probably acted on such knowledge, that is, he consented to execute the agreement because, by the literal terms of it, he was secure in the possession of £575 for himself, and £180 for his nephew, that is £755 in the whole.

I am clearly of opinion that this could not bind the Plaintiff, and that the Plaintiff might immediately have renounced the whole arrangement, notwithstanding the execution of the deed. But I do not think he could compel the Defendant to accept the conveyance (two of the terms of which then were to give to him, the Defendant, £575, and his nephew £180) so altered as to make the conveyance stand without those two terms being in it, as if, in fact, the arrangement had been other than it was; nor do I see

how the Plaintiff can compel the Defendant to replace this sum of money, and yet let the rest of the arrangement stand. However improper it might be in the Defendant to abstract the moneys, he did it openly; it appeared in the books, any one might have inspected them on the Plaintiff's behalf, and the Defendant says he acted on the faith of the books being accepted, and the mutual releases executed on the state of the books as they stood.

If the moneys were in existence as part of the partnership assets, in the shape of stock or bills, it is possible that the Court might have reached them in that character; but in the way of an order to refund it appears to me to be impossible to direct that to be done without cancelling the whole arrangement, and causing an account to be taken on the footing of an ordinary dissolution of partnership: that is, the Court cannot set aside the arrangement between the parties as to a portion and uphold it as to the rest.

The next question then is, can I now set aside the whole transaction? I would certainly have done so in December, 1864, and held that the Plaintiff could not have been compelled to abide by an arrangement entered into by him in such a state of circumstances. But the Plaintiff has by his own acts precluded himself from obtaining that relief now. The taking of the money is admitted by the Defendant to the Plaintiff, and no excuse offered, on the 8th of December, 1864. The bill of the Plaintiff is filed in February, 1865; and it comes on to be heard in July, 1866, but in the meantime the concern has been wound up. The Plaintiff took possession of the mill in May, 1865, has sold the machinery and all the matters connected with it, and has put an end finally to the business. If he had insisted on his not being bound by the transaction of November, 1864, he was bound to leave the matter exactly as it was, and then the concern would have been wound up by the Court. With the concurrence of the Defendant it might have been sold as a going concern, the Defendant would have had a voice in the sale of the machinery, and might have made it more profitable, but he neither did nor could interfere, for the Plaintiff proceeded to act on the agreement as if he were entitled under it to deal with the partnership property as he pleased, and yet, besides this, to make the Defendant account for and repay the sums he had withdrawn, and to do so in direct violation of the clause for

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mutual release contained in the deed which constituted the arrangement.

Dismiss the bill without costs.

Solicitor for the Plaintiff: Mr. *Stephen Camp*, agent for Messrs. *Shackles & Birks, Hull.*

Solicitors for the Defendant: Messrs. *Reed & Phelps*, agents for Messrs. *Sale, Shipman, Seddon, & Sale, Manchester.*

M. R. 1866 *June* 21, 22.

DISNEY *v.* CROSSE.
EYRE *v.* PARKER.

Will—Appointment—Demonstrative Legacy.

A testator being entitled to real and personal estate absolutely, and having a power of appointment over certain settled personal estate in favour of his children, gave by his will certain pecuniary legacies to the children, and then appointed the settled property subject and charged with the legacies to his children. He also bequeathed and devised his residuary personal and his real estate, subject to the payment of the legacies given by his will:—

Held, that the legacies given to the children were in the nature of demonstrative legacies, and that the settled property was primarily applicable for the payment of them.

BY virtue of indentures, dated respectively the 22nd of April, 1812, and the 26th of May, 1817, certain personal estate was settled upon trusts for the benefit of *George Parker*, and *Isabella* his wife, during their respective lives; and after the decease of the survivor of them, for such of their children as they should jointly by deed appoint, or in default of such appointment as the survivor should by deed or will appoint; and in default of any such appointment, for their children (if more than one) in equal shares, with the usual provision as to bringing appointed shares into hotch-pot.

Isabella Parker survived her husband, and at the time of her death was absolutely entitled to considerable real and personal estate. By her will, dated the 9th of June, 1862, after giving certain specific and pecuniary legacies, and an annuity of £32, she

bequeathed the sum of £5600 3 per cent. Consolidated Bank Annuities to trustees upon certain trusts; and she gave the following legacies, that is to say—to her son, *John Oxley Parker*, £2000; to her daughter, *Isabella Catherine Eyre*, £2000; to her daughter, *Elizabeth Ann Duff*, £2000; to her daughter, *Mary Elizabeth Fraser*, £2000; to her daughter, *Sarah Ann Pilgrim*, £2000; to her daughter, *Frances Catherine Parker*, £1000; and to her grandson, *James Houson Parker*, £2000. And after directing the legacies of the daughters who should have husbands living at her death to be settled, and also after exercising a general power of appointment with respect to the proceeds of the sale of certain real estate contained in the indenture of the 26th of May, 1817, the testatrix bequeathed as follows:—

"In exercise of the powers for this purpose given to me by the settlement made on my marriage with my said late husband, dated on or about the 22nd day of April, 1812, and of every other power authorizing or enabling me in this behalf, I appoint and give all the personal estate, monies, and premises thereby settled or agreed to be settled, and the stocks, funds, and securities upon which the same are or may be invested (subject and charged with the payment of the aforesaid pecuniary legacies to my said son and daughters), unto my said grandson, *James Houson Parker*, absolutely; but in case he shall die under the age of twenty-one years, I appoint and give all the said last-mentioned personal estate, monies, and premises, and the stocks, funds, and securities, in or upon which the same are or may be invested, subject as aforesaid, unto my said son-in-law, *Henry Richard Eyre*, absolutely. And subject to the payment of all the aforesaid legacies, and the said annuity, and my debts, funeral and testamentary expenses, I give all the residue of the personal estate which I may be entitled to at my decease, or over which I may have any disposing power, to my said grandson, *James Houson Parker*, absolutely; but in case he shall die under the age of twenty-one years (subject as last aforesaid), I give all the residue of my personal estate to my said son-in-law, *Henry Richard Eyre*, absolutely; and subject also to the said legacies, annuity, debts and expenses, and in exercise of all powers of appointment vested in or otherwise enabling me, I appoint and give *Bellman's Farm*,

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in *Essex*, and all the real estate to which I shall be entitled at my decease, or over which I have any disposing power, unto my said grandson, *James Houson Parker*, his heirs and assigns, absolutely," with a gift over of the last-mentioned property to *Henry Richard Eyre*, in event of *James Houson Parker* dying under twenty-one.

The testatrix had ten children, all of whom attained the age of twenty-one.

Disney v. *Crosse* was a suit for the administration of the trusts of the indentures of the 22nd of April, 1812, and the 26th of May, 1817. *Eyre* v. *Parker* was a suit for the administration of the real and personal estate of Mrs. *Parker*. Both now came on together for further consideration. The principal question discussed was, what was the primary fund for the payment of the legacies given by the will of Mrs. *Parker*, to her son, *John Oxley Parker*, and her daughters therein named.

Mr. *Kekewich*, for the Plaintiffs in *Disney* v. *Crosse*.

Mr. *Cotton*, for *Henry Richard Eyre*, the Plaintiff in *Eyre* v. *Parker*, submitted that the primary fund for payment of the legacies was the residuary personal estate of the testatrix; next to that, *Bellman's Farm*, and her real estate: and that the settled property ought only to be had recourse to in case of a deficiency; for the legacies were not to be considered as appointments of that property. If this view of the case were adopted, those who claimed the settled property, in default of appointment, would be compelled to elect whether they would take under the will, or under the settlement.

Mr. *Cole*, Q.C., and Mr. *Faber*, Mr. *Jessel*, Q.C., and Mr. *J. T. Humphry*, Mr. *Selwyn*, Q.C., and Mr. *B. B. Rogers*, Mr. *Baggallay*, Q.C., and Mr. *Shebbeare*, Mr. *Montague Cookson*, and Mr. *Wickens*, for the children of Mrs. *Parker*, and persons claiming under them, contended that the legacies were not appointments of the settled property; but merely, as the testatrix herself termed them, "pecuniary legacies," and as such to be paid out of the fund ordinarily applicable for the payment of legacies. It was the rule of the Court,

established in *Bootle* v. *Blundell* (1), that the general personal estate was the primary fund for such payment, unless there were sufficient indication in the will that the testator intended not merely to charge other portions of his estate with the payment, but to exonerate the general personal estate. That rule was rigidly adhered to in all cases except in those of which *Roberts* v. *Walker* (2), was the type—where a testator directed real estate to be sold and then blended the proceeds of the sale with the general personal estate. If the real estate was not directed to be sold, the ordinary rule was followed: *Boughton* v. *Boughton* (3); *Tench* v. *Cheese* (4); *Simmons* v. *Rose* (5).

The question of election was also discussed at some length; but the view of the case taken by the Court renders it unnecessary to report the arguments.

Mr. *Southgate*, Q.C., Mr. *John Pearson*, and Mr. *Marwood Tucker*, for *John Houson Parker*:—

Although the testatrix uses the word legacies in reference to these gifts, they are not in strictness legacies at all—they are appointments of the settled fund. If there were no residuary estate, it could not be doubted that the settled fund would be applicable in payment of them. Again, if there had been no gift of the residue of the settled fund to *J. H. Parker*, the person entitled in default of appointment could not have taken the whole fund without paying these legacies. *Boughton* v. *Boughton* (3) does not apply, as it relates simply to the question whether real or personal estate is primarily applicable to pay a legacy. We contend that these are in the nature of demonstrative legacies, payable primarily out of the settled property, as being the fund indicated by the testatrix for the payment of them.

Mr. *Cotton*, in reply.

LORD ROMILLY:—

I think that *Boughton* v. *Boughton* and *Roberts* v. *Walker*, and that class of cases, have no application. I do not pro-

(1) 1 Mer. 193.
(2) 1 Russ. & My. 752.
(3) 1 H. L. C. 406.
(4) 6 D. M. & G. 453.
(5) 6 D. M. & G. 411.

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pose to interfere with the ordinary course of administration of assets; but I hold that these legacies are to be considered as demonstrative legacies, for the payment of which a particular fund is appointed. The testatrix, who has the power of appointing a particular fund to her children, sons and daughters, gives them legacies. Assume that she goes on to say, I direct those legacies to be paid out of the fund I have the power of appointing. Then the legacies would be clearly demonstrative, that is to say, they would be paid out of that fund in the first instance, and if that fund was not sufficient, they would be paid out of the residue. Upon consideration of the matter I have come to the conclusion that unless this is an appointment of the funds to the extent of these legacies to these persons, there is no appointment at all. If there is an appointment, then the observations which I have already made apply, that there is a particular fund set apart for the payment of these legacies, which can only be applied in payment of them. But if it is not an appointment of the fund, what is the meaning of these words—"In exercise of the power for this purpose given to me by the settlement made on my marriage, I appoint and give all the estate subject and charged with the aforesaid pecuniary legacies to my sons and daughters, to *James Houson Parker*." Supposing *James Houson Parker* had been an object of the power, he would have taken the fund, and that would have been a good appointment. But if the will stopped there could it be reasonably contended that there was not an appointment of that fund by virtue of the power contained in the settlement? She appoints the whole of the fund to *James Houson Parker*, subject to the payment of the aforesaid legacies to her sons and daughters: the sons and daughters are objects of the power, and can anybody correctly say this is not an appointment to them? The fact of her appointing the whole of the residue of the fund to a person who is not an object of the power, can have no effect upon the construction of the words, which must be exactly the same whether the testatrix has or has not made an error in supposing her grandson an object of the power. If the father had been living, and it had been an appointment to the father in lieu of the son, the construction would have been exactly the same. If then it is an appointment of the

fund, how much is it an appointment of? It cannot be an appointment of so much of the legacies as the residue is not able to pay. It is an appointment of the whole amount of the legacies, which no doubt are pecuniary legacies; but they are pecuniary legacies which the testatrix directs to be paid in the first instance out of a particular fund, which may be applied to the payment of those particular legacies, and cannot be applied to the payment of any other legacies. She says subject to the payment of the *aforesaid pecuniary legacies to my sons and daughters.* She had given many more legacies previously to persons who were not objects of the power; and she does not say subject to those legacies, but only subject to the legacies given to her sons and daughters, who are the objects of the power. I am of opinion, therefore, that what I propose to do, will not make any new rule with respect to the distribution of assets. I merely say that a particular fund shall be first applied in payment of certain legacies. I am of opinion that, though it is true that the residue is charged with those legacies if the settlement fund is not able to pay them, yet that the settlement fund in the first instance is liable to pay all those legacies that can be properly paid out of it by virtue of the appointment of that fund.

Solicitors for the Plaintiff in *Disney* v. *Crosse:* Messrs. *Ranken, Ford, Longbourne, & Longbourne.*

Solicitors for the Plaintiff in *Eyre* v. *Parker:* Messrs. *Frere, Cholmeley, & Forster.*

Solicitors for other parties: Mr. *Annesley;* Messrs. *Hensman & Nicholson;* Messrs. *Clayton & Sons;* Messrs. *Wilde, Rees, Humphrey, & Wilde;* Mr. *H. E. Brown;* Messrs. *Bircham & Co.*

M. R.
1866
July 14, 25.

GLAHOLM *v.* BARKER.

Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *ss.* 510, 511, 512, 514—*Liability of Ship-owner—Damages payable to Families of deceased Seamen.*

Where the owner of a vessel which has wrongfully occasioned the loss of several of the crew of another vessel institutes proceedings under the *Merchant Shipping Act*, 1854, s. 514, that the amount of their liability may be determined, the damages sustained by the families of the deceased seamen are to be ascertained in the same way as if the liability of the owners were unlimited; and, if that amount exceeds the liability of the owner in respect of the tonnage of the ship, then the whole amount of his liability is to be distributed rateably among them.

The statutory limit of £30 as the amount of damages payable in respect of each family by section 510 of the Act, applies only to damages assessed under inquiries instituted by the Board of Trade.

THE Plaintiffs in this suit were the owners of the British brig *Edith Mary*, of 248 tons burthen, which, on the 13th of February, 1864, came into collision with a vessel called the *Thomas Barker*, when, as the result of the collision, the *Thomas Barker* was sunk, and all her crew but two were drowned. There was a cargo of coal, but no passengers, on board the *Thomas Barker*.

The Plaintiffs had been threatened with proceedings by the owners of the ship and cargo, by the two survivors of the crew, and by the representatives of the seven deceased seamen.

The bill was filed against the several claimants under section 514 of the *Merchant Shipping Act*, 1854 (17 & 18 Vict. c. 104), and prayed that the amount of their liability might be declared and distributed between the Defendants and all others who should establish claims against the Plaintiffs.

The only claims that were unsatisfied at the hearing of the cause were those of the representatives of the seven deceased seamen.

By the decree, dated the 25th of April, 1865, the Master of the Rolls made a declaration that the Plaintiffs were liable for damages to the extent of £15 per registered ton of the ship; and an inquiry was directed to ascertain to what amount the Plaintiffs were liable, and the proportions thereof to which the Defendants were respectively entitled.

The case came by appeal before the Lords Justices, who, by an

order of the 18th of January, 1866, affirmed the decision of the Court below, with this variation, that the Plaintiffs were declared "liable for damages to an extent not exceeding £15 per registered ton of the ship."

By the certificate of the Chief Clerk, dated the 2nd of July last, he certified that the Plaintiffs were liable, having regard to the declaration of the decree, to the amount of £1779 10*s.*, with interest, in the proportions set forth in the schedule.

The case was now adjourned into Court, as the Plaintiffs contended that, under the provisions of the *Merchant Shipping Act*, 1854, they were only liable to pay £30 to the representatives of each of the deceased seamen, or £210 in all.

Mr. *Druce*, for the Plaintiffs, referred to the *Merchant Shipping Act*, 1854, ss. 504, 510, 511, 512, 514; to the *Merchant Shipping Act Amendment Act*, 1862, ss. 54, 56; and contended that £30 was the statutory limit to the damages payable in respect of each seaman who had been killed, and that that aggregate sum ought to be divided between his widow and children.

Mr. *Haddan*, for the Defendants, supported the Chief Clerk's certificate, and contended that the limit of £30 only applied to damages under inquiries directed by the Board of Trade, and that, in a proceeding under section 514 of the *Merchant Shipping Act*, 1854, the damages were to be assessed in the same way as if the liability of the owner were unlimited. He referred to *Straker* v. *Hartland* (1); *Nixon* v. *Roberts* (2).

Mr. *Druce*, in reply.

July 25. LORD ROMILLY, M.R.:—

This case, which is adjourned from Chambers, raises a question of considerable importance, under the *Merchant Shipping Act*, (17 & 18 Vict. c. 104), as to the extent of liability of the owners of a ship which has wrongfully caused loss of life, to make good the damage sustained by the family of the person so killed, that is the wife or children.

(1) 2 H. & M. 570. (2) 1 J. & H. 739.

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At the hearing of the cause, I determined that in these cases the liability of the owner of the ship which had wrongfully occasioned the loss of life to any of the crew of another vessel was limited to £15 per ton on the registered tonnage of the vessel which had done the wrong, and this view of the case was affirmed on appeal. But the question which now comes before me is not whether the liability of the owners is limited to £15 per ton, but whether the damages which can be recovered by the widow and children of the seamen killed are or are not limited to £30 for each man killed, whatever may be the loss sustained by his family. The tonnage of the *Edith Mary*, which was the vessel which did the wrong, was about 249 tons. The liability, therefore, to pay damages would be £3735; the amount of damages sustained by the families of the lost seamen, who are seven in number, the Chief Clerk has found to be £1700, which sum, together with interest, amounting in the whole to £1779 10*s.*, he proposes to divide between the families of the seven mariners who were lost upon this occasion, in various proportions. The owners say they are liable only to pay seven times £30, that is £210, and no more. This is a question which arises solely upon the Act of Parliament. I do not think it necessary to refer to the former clauses with respect to the limitation of the liability of the owners which I read upon the former occasion, because the question now raised relates solely to what the persons who have sustained damages can recover. The clauses which are relied upon by the owners are these: first, the 510th clause, which is in Part 9 of the *Merchant Shipping Act*, under the title of "Liability." With reference to this I only observe that the Board of Trade may direct proceedings, and make an inquiry, but each person may require that the question shall be tried before a special jury, and the 509th clause gives detailed provisions for the conduct of the proceedings. The 510th clause is in these words:—"The following rules shall be observed as to the damages recovered in any such inquiry, and the application thereof, that is to say, first, the damages payable in each case of death or injury shall be assessed at £30."

That seems to be a positive assertion that the damages shall be £30 and no more upon an inquiry by the Board of Trade.

"2. The damages found due on any such inquiry as aforesaid shall be the first charge on the aggregate amount for which the owner is liable, and shall be paid thereout in priority to all other claims.

"3. All such damages as aforesaid shall be paid to Her Majesty's Paymaster General, and shall be distributed and dealt with by him in such manner as the Board of Trade directs; and in directing such distribution the Board of Trade shall have power, in the first place, to deduct, and retain any costs incidental thereto; and, in the next place, as regards the sums paid in respect of injuries, shall direct payment to each person injured of such compensation, not exceeding in any case the statutory amount, as the said board thinks fit."

If the case rested upon that clause alone, it is clear to me that the damages would be limited to £30 a head, and that nobody under such an inquiry by the Board of Trade could recover more than £30. Then the fourth rule directs that the Board of Trade shall refund to the owner the surplus, after making the distribution; the fifth, that the Board of Trade shall not be liable to any action for what it has done; and the sixth, that if the amount for which the owner is liable is insufficient to meet the demands upon it, they are all to abate proportionally. Then the 511th section seems to open the question, for it says:—

"After the completion of such inquiry as aforesaid, if any person injured estimates the damages payable in respect of such injury, or if the executor or administrator of any deceased person estimates the damages payable in respect of his death at a greater sum than such statutory amount, or, in case of a compromise having been made by the Board of Trade, than the amount accepted by such Board by way of compensation for such injury, or death as aforesaid, the person so estimating the same shall, upon repaying or obtaining the repayment by the Board of Trade to the owner of the amount paid by him to the Board of Trade in respect of such injury or death, be at liberty to bring an action for the recovery of damages in the same manner as if no power of instituting an inquiry had hereinbefore been given to the Board of Trade, subject to the following proviso:"—The meaning appears

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to me to be this: that if any person thinks £30 is not enough for the loss of his father, he is at liberty to bring an action, just as if the Board of Trade had not awarded him that amount, with which it is probable in most cases, as in the present, they would not be satisfied, subject to this proviso: "that any damages recoverable by such person shall be payable only out of the residue, if any, of the aggregate amount for which the owner is liable, after deducting all sums paid to Her Majesty's Paymaster General in manner aforesaid;" that is to say, the Board of Trade having made its inquiry, and made certain payments, those are the first charges, and the balance which is to be paid to the owner, which is the extent of his liability, is the only fund which is applicable to pay the damages which may be recovered in any action. Then, there is this further proviso, "That if the damages recovered in such action do not exceed double the statutory amount," that is to say, do not exceed £60, "such person shall pay to the Defendant in such action all the costs thereof."

I am of opinion that the Act does not limit the damages to be recovered to £30, because section 511 distinctly speaks of the Plaintiff paying the costs of the action in case the amount recovered is not more than double the statutory amount. It therefore assumes that he may recover more than that. But I think the 512th and the 514th are the two sections which govern the case. The 512th is this: "In cases where loss of life or personal injury has occurred by any accident in respect of which the owner of any such ship as aforesaid is or is alleged to be liable in damages, no person shall be entitled to bring any action, or institute any suit or other legal proceedings in the *United Kingdom* until the completion of the inquiry (if any) instituted by the Board of Trade, or until the Board of Trade has refused to institute the same; and the Board of Trade shall, for the purpose of entitling any person to bring an action, or institute a suit or other legal proceeding, be deemed to have refused to institute such inquiry whenever notice has been served on it by any person of his desire to bring such action, or institute such suit or other legal proceeding, and no inquiry is instituted by the Board of Trade in respect of the subject-matter of such intended

action, suit, or proceeding for the space of one month after the service of such notice."

It is clear that the statute does not tie down the family of the lost man to any amount of damages, whether the Board of Trade institute an inquiry, or whether it does not, except that when the Board of Trade institutes an inquiry it is subject to the particular regulations which I have referred to, and which are specified in clause 511; but it allows individuals to bring actions, and gives no limit to the damages. This is stated in section 514:—

"In cases where any liability has been, or is alleged to have been, incurred by any owner in respect of loss of life, personal injury, or loss of, or damage to, ships, boats, or goods, and several claims are made or apprehended in respect of such liability; then, subject to the right hereinbefore given to the Board of Trade of recovering damages in the *United Kingdom* in respect of loss of life or personal injury, it shall be lawful in *England* or *Ireland* for the High Court of Chancery to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability subject as aforesaid, and for the distribution of such amount rateably amongst the several claimants, with power for any such Court to stop all actions and suits pending in any other Court in relation to the same subject-matter; and any proceeding entertained by such Court of Chancery may be conducted in such manner, and subject to such regulations as to making any persons interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs, as the Court thinks just."

This is the clause under which I am acting. It is a proceeding in the Court of Chancery in order to prevent multiplicity of actions for determining the amount of liability, and also for determining how the amount is to be divided between the parties. It is clear that the persons interested here, according to this clause, are to have the amount distributed among them "rateably," which in my opinion clearly points to this, that, if necessary, the total amount due from the owner may be "distributed rateably." The meaning of the words "to be distributed rateably," I understand to be this: that, provided the damages sustained by the families of the

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deceased persons in the aggregate amount to or exceed the amount for which the owner is liable, then that amount is to be divided amongst the families of those deceased persons rateably; but it does not mean that the whole amount of the liability is to be divided among the families of the deceased persons, whatever may have been the amount of the damages sustained by them. I can make this clear by an illustration:—Supposing the registered tonnage of the wrong-doing vessel was 100 tons, then the extent of the liability of the owners would be £1500. Supposing there were 100 persons drowned by the fault of that vessel, then the family of each person would only get £15, that amount being clearly less than the amount of the damages sustained. But supposing two persons only were drowned, it does not therefore follow that the £1500 is to be divided between those two, but only the amount of damages which each family has sustained, and this is the view that the Chief Clerk has taken of it, because, in this case, the liability would be nearly £4000, but the amount of damages sustained the Chief Clerk has found to be £1700, upon which he has calculated interest. In other words, in my opinion the damages sufferers have sustained are to be ascertained in the same way as if the liability of the owners were unlimited, and then the sum for which the owner is liable is to be applied in payment of the damages when so ascertained; if they are less than the amount of his liability, then there is to be paid to each family the damages sustained; but if the damages so ascertained exceed the amount of liability, then the whole amount for which the owner is liable must be distributed among the families rateably according to the amount of damages sustained; if it is less, they are paid in full, and the balance paid over to the owner.

All the children of a deceased seaman are entitled to share, including those that have attained the age of twenty-one.

Solicitor for the Plaintiffs: Mr. *J. W. Hicken*, agent for Messrs. *Brown & Son, Sunderland.*

Solicitors for the Defendants: Messrs. *Young, Maples, Teesdale, & Nelson*, agents for Messrs. *Lietch & Kewney, North Shields.*

In re LORD'S ESTATE.

LORD *v.* LORD.

M. R.
1866
July 26.

Practice—15 & 16 *Vict. c.* 86, *s.* 40—*Cons. Ord. xxxv. r.* 33, 34—*Administration Suit—Affidavit verifying Accounts—Cross-examination.*

An affidavit filed by an accounting Defendant in an administration suit verifying his accounts is the subject of cross-examination under 15 & 16 Vict. c. 86, s. 40, but he is entitled to notice of the points on which he is to be cross-examined.

THIS was a motion made in a suit for the administration of the estate of a testatrix, in which a decree was made in the year 1863. By an order of the Court, the conduct of the suit had been entrusted to *R. Hooper*.

The Defendant *James Lord*, who had made the usual affidavit verifying his accounts, was served with a *subpœna*, and attended at the examiner's office, but on being called on for cross-examination on behalf of *Hooper*, declined to be sworn, or to answer any questions, on the ground that he could not, according to the practice of the Court, be called on to be cross-examined upon such an affidavit, and that he had received no notice of *Hooper's* objections to the accounts, or of the points as to which he was to be cross-examined.

The present motion was made on behalf of *Hooper*, that the Defendant might be ordered to attend, and be sworn in the above matter and cause.

Mr. *Baggallay*, Q.C., and Mr. *Morris*, in support of the motion:—

In this case *Hooper* is entitled to cross-examine the Defendant on his affidavit, under section 40 of 15 & 16 Vict. c. 86, which provides that "any party having made an affidavit to be used, or which shall be used, on any claim, motion, or other proceedings before the Court, shall be bound, on being served with such writ, to attend before an examiner for the purpose of being cross-examined."

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Mr. *E. F. Smith*, Q.C., and Mr. *Davey*, for the Defendant:—

The affidavit filed by the Defendant to verify his accounts is not such a one as can subject him to cross-examination under section 40 of the Act. The practice with regard to affidavits filed for this purpose is laid down in Cons. Order xxxv., Rules 33, 34, which direct that, where an account is to be taken, the accounting party shall make out his account and verify the same by affidavit; and that "any party seeking to charge any accounting party beyond what he has by his account admitted to have received, shall give notice thereof to the accounting party, stating, as far as he is able, the amount sought to be charged, and the particulars thereof." The Defendant, therefore, can be examined on his account, if served with proper notice, but cannot be cross-examined on his affidavit. In *Manby* v. *Bewicke*, No. 2 (1), it was held by the Lords Justices that the common affidavit as to documents was not the subject of cross-examination, and that the words in section 40 of the Act, "an affidavit which has been used, or which shall be used," referred to user by the party making the affidavit. In the present case the Defendant did not file the affidavit on his own behalf. It is an admission on oath of the sums with which he is to be charged, but does not operate as a discharge. At any rate, if examined, he is entitled to proper notice as to the points on which he is to be examined: *Wormsley* v. *Sturt* (2).

LORD ROMILLY, M.R.:—

I am of opinion that Mr. *Hooper* is entitled to cross-examine the Defendant on his affidavit, but that he must give him notice of the points on which he proposes to cross-examine him.

Solicitors: Messrs. *Chauntler & Crouch;* Messrs. *Willoughby & Cox.*

(1) 8 D. M. & G. 470.

(2) 22 Beav. 398.

WENTWORTH *v.* LLOYD.

M. R.
1866
July 11.

Practice—Costs—Third Counsel—Consolidated Order xl. rule 32*—Depositions taken abroad.*

A third counsel was allowed in a case which occupied six days at the hearing, and where the bill, answers, and evidence, contained upwards of 6000 folios.

Notwithstanding Consolidated Order xl. rule 32, a solicitor is allowed to charge a reasonable sum for reading depositions in a cause taken abroad.

IN this suit the bill was dismissed with costs at the hearing. Summonses had been taken out both by the Plaintiff and the Defendant for the purpose of reviewing the taxation of costs.

One of the questions was, whether the taxing-master was right in allowing three counsel to the Defendant. The cause had been argued for six days before the Master of the Rolls, and the bill, answers, and evidence, contained upwards of 6000 folios.

Mr. *Southgate*, Q.C., and Mr. *Surrage*, for the Plaintiff, contended that this was not a case for allowing three counsel. They referred to *Pearce* v. *Lindsay* (1).

Mr. *Baggallay*, Q.C., and Mr. *Pemberton*, for the Defendant, *Lloyd*, were not called upon.

LORD ROMILLY, M.R.:—

I remember this case being argued. The evidence did not contain much that was immaterial or irrelevant, and all of it required a most minute and careful examination. If three counsel are not allowed here, they ought not to be allowed at all.

Another question was, whether the taxing-master was right in disallowing an item of £72, being a charge, at the rate of 4*d.* per folio, by the Defendant's solicitor for reading certain depositions

(1) 1 D. F. & J. 573.

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taken before a special examiner in *Australia*. The Master had allowed a sum of £292 for preparing briefs of the same depositions.

Mr. *Baggallay*, Q.C., and Mr. *Pemberton*, urged that this item ought to be allowed.

Mr. *Southgate*, Q.C., and Mr. *Surrage*, for the Plaintiff:—

Consolidated Order XL. r. 32, specifies the matters for which a solicitor can charge on a taxation between party and party, and no charge is thereby allowed for reading depositions. Either the solicitor's bill must be taxed according to the present regulations, or, if we are to go back to the old system and allow a solicitor to charge for what he actually does, the item of £292 for preparing briefs, which is mere copying, ought to be disallowed.

Mr. *Dickinson*, and Mr. *Dryden*, for other Defendants.

LORD ROMILLY, M.R.:—

The peculiarity of this case is, that the depositions were taken in a foreign country: the solicitor here knew nothing about them, and, until he had read them, he could not conduct the cause properly. I think that, in the case of depositions taken abroad, a reasonable allowance ought to be made for their perusal; but £72 seems to me to be too much. I think I ought to allow the solicitor £50 for reading these depositions.

Solicitor for the Plaintiff: Mr. *C. J. Mander*.

Solicitors for the Defendants: Messrs. *G. A. Crawley, Arnold, & Green*; Mr. *Wheeler*.

In re REECE'S ESTATE.

GOULD *v.* DUMMETT.

M. R.
1866
July 30, 31.

Costs—Taxation—Higher or Lower Scale—Charge for Settling Minutes.

In administration suits, where the gross value of the estate to be administered amounts to £1000 at the time of the institution of the suit, the higher scale of costs applies.

Under the regulations of the Court, solicitors are entitled to charge for settling the minutes of orders, although no minutes are issued.

THIS was a summons taken out by the Plaintiff and Defendant in a creditor's suit for the administration of the estate of a testator named *Reece* (both parties having employed the same solicitors) to review the Taxing Master's certificate of the costs of the suit.

The estate of the testator, at the time of the institution of the suit, amounted to about £1350, but part of it was subject to a mortgage for a sum, the amount of which was uncertain at that time, but was afterwards ascertained to be £594, which was paid off by the Defendant after the institution of the suit.

The Taxing Master had taxed the costs according to the lower scale, and had disallowed charges for settling minutes of orders where no minutes had been issued.

Mr. *G. N. Colt*, for the Plaintiff, and Hon. *E. Romilly*, for the Defendant:—

By the Regulations of the Court as to solicitors' fees and charges (1), the lower scale applies only to suits in which the estate to be administered is under the amount or value of £1000. That refers to the gross value at the time of the institution of the suit, not to the ultimate net value after deducting payments made after the suit has been instituted. In *Judd* v. *Plum* (2), where the lower scale only was allowed, the value of the estate had been reduced to less than £1000 by payments properly made before the institution of the suit.

As to the minutes, it has become the practice of the Registrars

(1) Cons. Ord. p. 195. (2) 29 Beav. 21.

M. R. 1866 *In re* Reece's Estate.

to issue orders without previously issuing minutes; but this practice ought not to deprive the solicitors of the fees which they are expressly authorized to charge by the regulations.

Gould v. Dummett.

July 31. Lord Romilly, M.R:—

I am of opinion that these bills of costs should be taxed on the higher scale. I am of opinion that the lower scale applies where the gross value of the estate to be administered is below £1000 at the time when the suit is instituted, and not where the net value is below that amount. In the administration of a large estate, which eventually may turn out to be insolvent, the solicitor is entitled to the same scale of costs as if a large residue existed; but when an estate originally exceeding £1000 has been, before the institution of the suit, reduced by payments properly made by the legal personal representative, to an amount below £1000, then the lower scale of costs applies.

I am also of opinion that the solicitor is entitled, under the General Order regulating fees, to charge for settling the minutes of orders actually made, although such orders never were in minutes.

Solicitors: Messrs. *Church, Prior, & Bigg.*

M. R. 1866 *July 5.*

BRANCKER *v.* CARNE.

Practice—Interrogatories for Examination of Plaintiff—Staying Proceedings.

A Defendant may file interrogatories for the examination of the Plaintiff, after notice of motion for decree has been given, and the Plaintiff has filed his affidavits; and proceedings in the suit will be stayed until the Plaintiff has answered, provided that there has not been any excessive delay.

THE bill in this suit was filed on the 19th of February, 1866. The Defendant *Carne* was not required to answer, but after obtaining several extensions of the time for putting in a voluntary answer, he finally put it in on the 18th of April. The Plaintiff, on the 21st of May, gave notice of motion for decree, and filed his affidavits on the 10th of June. *Carne* filed a concise statement

and interrogatories for the examination of the Plaintiff on the 16th of June; and on the 29th of June filed his affidavits. The Plaintiff had not yet answered.

Mr. *Kay* moved, on behalf of *Carne*, that all proceedings in the suit should be stayed until the Plaintiff had put in a sufficient answer.

Mr. *Baggallay*, Q.C., and Mr. *Little* for the Plaintiff; and Mr. *Jessel*, Q.C., and Mr. *W. F. Robinson* for Defendants:—

This application is made purely for the purpose of delay; the Defendant might have filed his interrogatories in March, or he might have got all the information he wants by cross-examining the Plaintiff on the affidavit he has filed. It is now nearly six months since the bill was filed; the delay has been entirely occasioned by *Carne*; and now he wishes to throw us over the long vacation. Besides the motion is contrary to the practice of the Court. A concise statement and interrogatories take the place of a cross bill for discovery under the old practice. Now where the cross bill sought relief, the original cause was never delayed, but the cross cause was advanced. But where the cross bill sought discovery only, the Court never stayed proceedings unless the Plaintiff was in default in answering. Here he is in no default.

LORD ROMILLY, M.R.:—

The case stands thus: The Defendant waits to see upon what evidence the Plaintiff supports his case; having seen this, on the 16th of June, he files a concise statement for discovery; and I may observe it is not merely discovery which he gets by so doing, but also the production of deeds and documents which may be of great importance. He does not delay filing his own affidavits, but files them on the 29th of June. Now the Plaintiff might have filed his answer within seven or eight days, and then the cause might have been brought on before the long vacation. Considering that this may be a matter of very great importance to the Defendant, I cannot refuse his application, simply because the Plaintiff says it is for the purpose of delay. If I did so, the effect might be that I might make a decree without having all the necessary materials

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before me; and the Defendant might be compelled to file another bill to be relieved from it. That is much too serious a thing for me to do. I do not think the delay has been excessive; and it might be got over by the Plaintiff filing his answer. I shall therefore make the order; but upon the answer being filed I will give leave to apply to advance the cause.

Solicitors for *Carne:* Messrs. *Field, Roscoe, Field, & Francis.*

Solicitors for the Plaintiff and other Defendants: Messrs. *Walker & Son.*

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THOMPSON *v.* HUDSON.

Mortgage—Penalty—Agreement to accept part of antecedent Debt in discharge of the whole—Proviso for reviving whole Debt in default of punctual Payment—Trust to raise Money by Mortgage—Mortgage by Trustee to Transferee of prior Mortgage—Consolidation of Mortgages.

A creditor having agreed with his debtor to remit part of the debt upon having a mortgage to secure the payment of the balance within two years, without prejudice to his right to recover the whole debt if such balance were not paid within that time, the debtor executed a mortgage for such balance, containing a proviso that if the mortgage debt were not paid within the two years, the whole of the original debt should be recovered. The debt was not paid within the two years:—

Held, that the proviso was of the nature of a penalty, from which the mortgagor was entitled to be relieved in equity, and that the mortgagee could only recover the smaller sum.

Property was conveyed to trustees upon trust to raise by mortgage £75,000, and pay off prior mortgagees, whose mortgage debts, including arrears of interest, amounted to that sum. The trustees did not raise the £75,000, but allowed *A.* to pay off the prior mortgagees, and to take transfers of their mortgages, and then, in consideration of such payments, executed a deed purporting to assign to *A.* the £75,000 raisable under the trust, and to mortgage the property to *A.* for £75,000:—

Held, that *A.* was not entitled to stand as a mortgagee for the principal sum of £75,000, but only for the principal and interest due on the transferred mortgages.

THIS was a summons taken out under the 54th section of the 15 & 16 Vict. c. 86, to obtain the special directions of the Court as to the mode of taking the accounts under the decree in a foreclosure suit.

In 1853, three decrees were made in three different suits, in each of which the *York and North Midland Railway Company* were Plaintiffs, and *George Hudson* was Defendant: two of the decrees directed certain accounts to be taken, and by the third, *Hudson* was ordered to pay £54,590 13*s.* 10*d.* to the company on or before the 1st of August, 1854, of which he was to pay into Court £20,000 on the first day of Hilary Term, and the remainder on the first day of Easter Term, 1854. The third decree was registered in the Common Pleas, and in the *North Riding* of *Yorkshire.*

By an agreement in writing, dated the 30th of January, 1854, and made between the company and *Hudson,* which recited the third decree, and recited that the company claimed, under the first and second decrees, £4104, and £14,831 2*s.* 6*d.*, and that *Hudson* admitted that they were entitled to recover those sums under the decrees, but that he would by appeal against the decrees, or some of them, have disputed his liability, if the agreement had not been entered into, *Hudson,* in consideration of the several sums decreed or claimed in the three suits being due to the company, and the company forbearing to require immediate payment of the £20,000 into Court, and consenting, upon the conditions thereinafter specified, to accept £50,000 (subject to the deductions thereinafter named) in discharge of the sums due to them in the suits, and £1000 in discharge of costs, agreed that he would execute within fourteen days a mortgage to the company, or to trustees for them, of a freehold estate, called the *Newby Park* estate, which he had lately agreed to sell to Lord *Downe* for £190,000, for securing to them the £50,000 and £1000, with interest at four per cent.; that on the 6th of April, 1854, being the day fixed for the completion of the sale to Lord *Downe,* he would pay the company £21,000 out of the purchase-money, and give them a mortgage of a freehold estate at *Whitby,* for securing £25,613 15*s.* (being the remainder of the £51,000, after deducting the £21,000, and the price of certain lands purchased from *Hudson* by the company) to be paid by three yearly instalments, such mortgage to be the first charge on the *Whitby* estate; that the agreement should not prejudice the existing lien of the company on *Hudson's* estates, nor the proceedings in the suits, nor their right to con-

M. R. 1866 THOMPSON v. HUDSON.

tinue the same until the total amount therein agreed to be accepted from *Hudson* should be wholly discharged; that *Hudson* would at any time, when required by the company so to do, consent to a final decree in each of the two first suits for the sums thereinbefore mentioned to be claimed, with costs of suit, and that he would not take any proceedings to avoid or reverse such decrees, or the decree in the third suit, other than by payment of the sums thereinbefore agreed upon, which should be taken to be a satisfaction of the whole amount of such claims; and the company, in consideration of the said several agreements on *Hudson's* part, agreed that, on his paying and securing the said sums of £21,000 and £25,613 15*s.*, and interest in manner aforesaid, they would accept the same in full discharge of the several sums decreed or claimed to be due to them in the three suits, for principal, interest, and costs, and would, at *Hudson's* expense, release their lien upon the *Newby Park* estate, and execute a proper release and discharge of their claims upon *Hudson*, but in case he should not pay and secure the said sums in manner aforesaid, or if a good and satisfactory mortgage should not be executed to them for the £25,613 15*s.*, or if *Hudson* should fail in performing all, or any, of the stipulations of the agreement on his part, then the company should be at liberty to recover the principal sums, interest, and costs, decreed or claimed to be due to them in the three suits, and to adopt all such proceedings in the suits, or otherwise for aiding their recovery of their claims, as they might be advised.

On the 10th of February, 1854, *Hudson* mortgaged the *Newby Park* estate to *Thompson* and *Seymour*, as trustees for the company, to secure £51,000.

By an Act of Parliament passed in 1854, the *York and North Midland Railway Company* was dissolved, and its property, rights, and liabilities, were vested in, and attached to the *North Eastern Railway Company*, and the latter company was empowered to continue, prosecute, and enforce actions, suits, and other proceedings at law, or in equity, commenced by the dissolved company.

The completion of the sale of the *Newby Park* estate having been delayed, the *North Eastern Company* and *Hudson*, in August, 1854, entered into a parol agreement (without prejudice to the

right of the company to recover the whole of the moneys ordered to be paid to them by the decree in the third suit, and the whole of the moneys which they were entitled to recover in the two first suits, and the consent to final decrees contained in the agreement of January, 1854, in case the principal and interest to be secured by mortgage were not duly paid on the respective days to be appointed for payment thereof) to vary the agreement of January, 1854, as follows: 1st. That £33,000, instead of £21,000, should be paid to the company out of the purchase-money for the *Newby Park* estate, part of which should be applied in payment of the interest due on the principal moneys agreed to be paid and secured by *Hudson*, and the balance in part payment of such principal moneys. 2ndly. That *Hudson* should give the company a mortgage of the *Whitby* estate, and of a leasehold estate in *Middlesex*, called the *Albert Gate* estate, and of certain furniture and certain shares in a dock company, to secure the balance of the moneys agreed to be paid and secured, with interest at four per cent., such mortgage to be subject to a prior charge for raising £75,000, out of which £75,000, and out of the balance of the purchase-money for the *Newby Park* estate, *Hudson* should pay off all existing charges and incumbrances on the property to be comprised in the mortgage. 3rdly. That the balance of principal moneys payable under the agreement, after payment of the £33,000, should be paid by *Hudson* to the company by two yearly instalments. 4thly. That on the mortgage being given to the company, and the said charges and incumbrances being paid off and satisfied by *Hudson*, the company should execute and give to him a proper release and discharge of their liens or charges upon his real and leasehold estates, and should on full payment of the balance of principal money and interest at the times appointed for payment thereof, execute a proper release of their claims upon him.

By an indenture, dated the 20th of October, 1854, the *Whitby* estate, the *Albert Gate* estate, the furniture and dock shares, were conveyed and assigned, subject to the several incumbrances affecting the same, to *Ralph Philipson* and *Joseph Wright*, their heirs, executors, administrators, and assigns, upon trust, by mortgage thereof, to raise any sum or sums of money not exceeding

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£75,000, and out of such moneys, with the aid of Lord *Downe's* purchase-money, to pay off two prior mortgages of the *Whitby* and *Albert Gate* estates, and two prior mortgages of the dock shares, and certain judgment debts (which were afterwards paid off with Lord *Downe's* purchase-money), and to pay the balance to *Hudson*, his executors, administrators, or assigns; and it was declared that nothing therein contained should be deemed to give any person, for payment of whose mortgage debt or judgment provision was thereby made, any lien or claim upon the estates and properties therein comprised, or the moneys to be raised thereunder.

On the 21st of October, 1854, the *Newby Park* estate was conveyed to Lord *Downe*, free from the mortgage to *Thompson* and *Seymour*, and the £33,000 was paid to the company out of the purchase-money.

By an indenture, dated the 21st of October, 1854, and made between *Hudson* of the first part, *Philipson* and *Wright* of the second part, and *Thompson* and *Seymour* of the third part, which recited (among other things) the agreement of January, 1854, and the parol agreement of August, 1854, and recited that the balance to be secured by mortgage by *Hudson* to the company was £14,566 17*s.* 6*d.*, *Hudson* conveyed the *Whitby* estate, and assigned the *Albert Gate* estate, the furniture, and the dock shares, to *Thompson* and *Seymour* (as trustees for the company), their heirs, executors, administrators, and assigns, subject to the four prior mortgages, and to the trusts of the deed of the 20th of October, 1854, and subject to a proviso for redemption on payment by *Hudson* of £14,566, by two equal instalments, on the 21st of October, 1855, and 1856, with interest as therein mentioned. And it was thereby declared, that nothing therein, or in the agreement of January, 1854, or the subsequent agreement, contained, should prejudice or affect the rights or claims of the company under the three decrees, or any of them, or their rights and remedies against *Hudson* under the decree, or their right under the agreement of January, 1854, or otherwise, to call upon *Hudson* to consent to or otherwise obtain a final decree in each of the two first suits for the sums in the agreement of January, 1854, mentioned, or any other sums which might be recoverable

in those suits, or to recover the whole of such sums and also the moneys by the decree in the third suit ordered to be paid, or should prejudice or interfere with any lien or charge which the company might have upon or against the property thereby conveyed and assigned, or any other real or personal estate of *Hudson*, it being the express understanding of all parties that the security intended to be thereby given should be in addition to, and not in substitution for, the charge or lien which the company might have upon the property therein comprised, under or by virtue of any of the said decrees; and that *Hudson*, his heirs, executors, administrators, or assigns, should not be at liberty to dispute the right of the company to recover the whole of the principal, interest, and costs, by the decree in the third suit awarded to the *York and North Midland Company;* and the whole of the principal moneys, interest, and costs, mentioned in the agreement of January, 1854, to be recoverable in the two first suits, except on or until full payment by *Hudson*, his heirs, executors, administrators, or assigns, on or before, but not after, the several days thereinbefore appointed for the payment thereof, of the principal sum and interest thereby secured.

The £14,566 17*s.* 6*d.* was not paid at the times appointed in the deed of the 21st of October, 1854.

Philipson and *Wright* did not raise the £75,000 under the trusts of the deed of the 20th of October, 1854. In 1857 *Thompson* and *Seymour*, on behalf of the company, paid off the principal, interest, and costs, due on the several prior mortgages on the *Whitby* and *Albert Gate* estates, and the dock shares, which amounted to £75,000, and the mortgages were transferred to them, as trustees for the company.

By an indenture, dated the 20th of October, 1857, and made between *Philipson* and *Wright* of the first part, *Hudson* of the second part, and *Thompson* and *Seymour* of the third part, which recited that *Thompson* and *Seymour* had paid off the prior mortgages upon an agreement between the parties thereto that the property comprised in the deed of the 20th of October, 1854, and also that the sum of £75,000 by the same deed directed to be raised should be respectively conveyed and assigned to them to secure the repayment of the sum of £75,000 so paid by them, in

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pursuance of such agreement, and in consideration of the moneys due and owing to *Thompson* and *Seymour* on the transferred mortgages, *Philipson* and *Wright*, by *Hudson's* directions, transferred to *Thompson* and *Seymour* the £75,000 by the deed of the 20th of October, 1854, directed to be raised, and all interest thenceforth to accrue due thereon, and *Philipson* and *Wright* conveyed and assigned, and *Hudson* confirmed, to *Thompson* and *Seymour* the several properties comprised in the deed of the 20th of October, 1854, subject to a proviso for redemption on payment by *Hudson* of £75,000. And it was declared that nothing therein contained should prejudice the rights of the company under the decrees, or under the agreement of January, 1854, or the rights of *Thompson* and *Seymour* under the mortgage deeds of the 21st of October, 1854, and the transferred mortgages or any of them.

In January, 1863, this suit was instituted by *Thompson* and *Seymour*, and the *North Eastern Railway Company*, against *Hudson*, and a great number of subsequent incumbrancers on his estates, for foreclosure, and in November, 1864, a decree was made directing an inquiry as to the incumbrances affecting the mortgaged property, and as to their priorities, and an account of what was due to the several incumbrancers. The present summons was taken out by the defendant *Hudson*. The principal questions, as to which the directions of the Court were desired, were as follows:—

1. Whether the account ought not to be taken on the footing that the Plaintiffs, the *North Eastern Company*, are bound to accept the sum of £14,566 7*s.* 6*d.*, with interest thereon, secured by the indenture of the 21st of October, 1854, in full satisfaction of all claims under the three decrees of 1853.

2. Whether the account ought not to be taken on the footing that the Plaintiffs *Thompson* and *Seymour* are not entitled to any charge on the mortgaged properties under the indenture of the 20th of October, 1857, or to charge against the said mortgaged properties any sums, except the sums respectively due for principal and interest on the several mortgages transferred to them.

The *Attorney-General* (Sir *H. Cairns*), Mr. *Jessel*, Q.C., and Mr. *H. M. Jackson*, for the Defendant *Hudson*, and for two other

Defendants, mortgagees of the property comprised in the deeds of the 20th and 21st of October, 1854, whose mortgages were subsequent to those deeds, but prior to the deed of the 20th of October, 1857:—

As to the first question, the mortgage of the 21st of October, 1854, must be subject to the general rule of equity, that a stipulation for increasing the mortgage debt upon non-payment within a certain time is a penalty, against which the mortgagor will be relieved: *Nicholls* v. *Maynard* (1); *Story*, Eq. Jur. (2). That rule is not affected by the fact that the larger sum was previously due to the mortgagee, where the abatement of part of the debt is not a mere act of grace on the part of the creditor, but is made under an agreement, for which he receives valuable consideration: *Rose* v. *Rose* (3). In this case the company received such consideration, viz. the mortgage itself, and *Hudson's* waiver of his right to appeal against the decrees in the former suits. Therefore the proviso in the deed of the 21st of October, 1854, if it was intended to prevent the redemption of the mortgaged property on payment of £14,566 7*s.* 6*d.*, and interest, unless paid on the days specified in the deed, is void, and the first question must be answered in the affirmative.

As to the second question, the deed of the 20th of October, 1857, is binding upon *Hudson*, who was a party to it, but not upon his incumbrancers, whose incumbrances are prior to it. The Plaintiffs desire to stand in the position in which they would have stood if the trustees of the deed of the 20th of October, 1854, had borrowed from them £75,000 on mortgage of the property under the trusts of that deed; whereas, in fact, the trustees never raised any money at all, but the Plaintiffs themselves paid off the prior incumbrances, and then took from the trustees a conveyance of the trust property and an assignment of the £75,000 raisable under the trust. The deed of October, 1857, expressly reserves the rights of the Plaintiffs as transferrees of the prior incumbrances; but under the trusts of the deed of the 20th of October, 1854, the £75,000 was to be applied in paying off those incumbrances. The deed of 1857 (except so far as it bound *Hudson*) was a fictitious transaction and

(1) 3 Atk. 519. (2) §§ 1314, *et seq.* (3) Amb. 331.

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a breach of trust, and the Plaintiffs can only stand in the place of the prior mortgagees, whom they have paid off, and whose mortgages have been transferred to them.

Sir *R. Palmer*, Q.C., Mr. *Selwyn*, Q.C., and Mr. *G. Williamson*, for the Plaintiffs:—

As to the first question, by the terms of the compromise *Hudson* once for all admitted the right of the company to recover £4104, and £14,831 2*s.* 6*d.*, under the first and second decrees of 1853, and waived his right to appeal in each of the three suits. By such admission and waiver he purchased the forbearance of the company from enforcing immediate payment of their debt under the decree in the first suit, and their release of part of their debt upon certain conditions, viz., the payment on a given day of part of the smaller sum, which they agreed conditionally to accept, the giving of a mortgage for the balance, and the payment of that balance within a certain time; but if any of those conditions were broken, it was expressly agreed that they should have the right to recover not only the £54,590 13*s.* 10*d.* under the first decree, but also the sums admitted to be due under the second and third decrees. Therefore the proviso in the deed of the 21st of October, 1854, from which the Defendant now asks to be relieved, is an essential term of the compromise. The conditional release of part of a debt is not a *novatio debiti* and an extinction of the old debt. This is not the case of an ordinary mortgage, with a penalty introduced to secure punctual payment, but a privilege conferred upon a certain condition, with a stipulation that if the condition is not observed the privilege shall cease. Against such a stipulation the grantee of the conditional privilege ought not to be relieved: *Ford* v. *Earl of Chesterfield* (1); *Davis* v. *Thomas* (2); *Sterne* v. *Beck* (3); *Erskine's* Institute (4).

As to the second question, it is admitted that *Hudson* is bound by the deed of 1857, and the other Defendants cannot be heard upon this summons, which was taken out by *Hudson* alone. The Plaintiffs, however, are entitled to stand as mortgagees for £75,000 against them; their incumbrances are subsequent to and subject

(1) 19 Beav. 428.
(2) 1 Russ. & My. 506.
(3) 1 D. J. & S. 595.
(4) Lib. i. tit. v. s. 25.

to the deed of the 20th of October, 1854, and the trusts of that deed have been substantially performed; £75,000 has been raised and applied in the manner directed by that deed, and it makes no difference to the subsequent incumbrancers that the trustees, instead of performing the trust themselves, allowed the Plaintiffs to perform it, and then adopted and ratified their acts.

LORD ROMILLY, M.R.:—

In this case, as I understand it, the first question is, not whether the compromise is binding on the Plaintiffs, but, assuming it to be binding, what is its construction and effect? The Plaintiffs' counsel have admitted that they proceed solely under the deed of the 21st of October, 1854, and that their contention is upon the construction and effect of that deed. I think that this was a very wise admission on their part, because I am clearly of opinion that the deed is binding upon all the parties, whatever the effect of the deed is. It is in that respect that this case is so much distinguished from *Ford* v. *Earl of Chesterfield* (1), and other cases of that description.

The case is this: there were three decrees made, I believe, by me, against *Hudson*, of which one ordered him to pay a sum of £54,000 into Court, and the others directed accounts to be taken. The decree for £54,000 was registered as a judgment; it was a debt which could have been enforced at any time against *Hudson* by execution in every possible form. *Hudson* might, no doubt, have appealed from my decision, and it is probable that I should have stayed the execution of the decrees pending the appeal, but, subject to that, the £54,000 could be enforced at any moment. At the same time everybody is well aware, that although a person has large property, if he has also large debts, to enforce the payment of a sum of money is not always a very easy matter; and accordingly an arrangement was entered into, whereby it was stated that the sums to be obtained under the two other decrees are agreed to be £4,000 and £14,800, and it was agreed that if £21,000 was paid out of the purchase money of the *Newby Park* estate, between £4000 and £5000 allowed for property purchased by the

(1) 19 Beav. 428.

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railway company, and a mortgage given for £25,600, the company would accept that, but if this was not done they were to revert to their former rights. This agreement was afterwards a little modified; the £21,000 was not paid at the time specified, and it was agreed verbally that the payment should be £33,000, and that the mortgage should be given for the balance. Upon that the deed of the 21st of October, 1854, was executed; £33,000 was paid at the time of its execution, and the mortgage was given for the balance, which then was in round numbers £14,000. The amount that was due, if the agreement had gone off, instead of being £14,000, was in round numbers £40,000; and accordingly, if the agreement had wholly gone off, if upon the 21st of October, 1854, no money had been paid, and no deed executed, there is no doubt that the railway company would have been entitled to enforce everything they could enforce under their decrees. I do not now go into the question, because it is not at all material to the view I take of the case, whether at that time *Hudson* was bound by his admission that £4,000 and £14,800 were due under the decree; I am disposed to think that he was. But if the agreement had gone off, there was no question but that the railway company would have been entitled to enforce the full amount of what was due to them, and that *Hudson* would have been entitled to appeal from all the three decrees which I had pronounced. But the agreement did not go off, it was carried into execution. That is the great distinction between this case and *Ford* v. *Earl of Chesterfield* (1); in that case Mr. *Duncombe* owed £69,000 to Lord *Chesterfield*. He was engaged to be married to Mrs. *Slingsby*, and she was to advance £38,000 at once in discharge of that debt, and thereupon Lord *Chesterfield* agreed that if that sum was advanced on or before a certain day the debt should be discharged; the marriage went off, the money was not paid, and then the attempt was made to say that that was a binding arrangement, which compelled Lord *Chesterfield*, as against the persons who had subsequent incumbrances, to reduce his charge against Mr. *Duncombe's* estate to £38,000 instead of £69,000. I held that that was not so. The creditor there agreed that he would reduce the amount of the debt if he were paid the money, but he was not paid the money, and accordingly

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he was not bound to allow any variation of the original debt. Here the contract has been carried into effect, and the only question is upon the construction of the contract, and the legal effect of it. The £33,000 has been paid, and the mortgage has been given, and there is no question, in my opinion, as to the meaning of the mortgage; the meaning is this, that if the £14,000 is not paid in two sums of £7000 each on the 20th of October in the two following years the whole amount is to be recovered. Now, the question is, whether that can be enforced or not. This Court will never allow a penalty to be enforced; it relieves against penalties. There can be no question whatever of this, that if a person granted a mortgage to another for £14,000, with a proviso that if the £14,000 was not paid upon the day specified in the proviso for redemption, he should pay £40,000, that would be absolutely void, and could not be enforced.

Now, this case differs a little from that in this respect, because the deed recites that the mortgagor owes the mortgagee £40,000, and that the mortgagor will give the mortgagee a mortgage upon his property for £14,000, with this proviso, that if the £14,000 is not paid upon the day appointed by the proviso for redemption, he shall be at liberty to take the whole £40,000. I am of opinion that this cannot be done. It is a thing for which the parties cannot contract. They might have done it in a different form (though it may be doubted whether *Hudson* would have approved of that). They might have made a contract to this effect; they might have said, that the mortgage should be for £40,000, and that if £7000 was paid on the 20th of October, 1855, and another £7000 on the 20th of October, 1856, then that no more money should be recovered. They might have done it in that form, but they cannot do it in the form which they have adopted, which is inflicting a penalty.

It is to be observed what the contract was. The contract was to pay £33,000, and to give a mortgage for £14,000. The mortgage for £14,000 must be given subject to the rules by which mortgages are effected. A mortgage cannot be made which is contrary to the rules which a Court of equity requires to be observed when it comes to enforce the execution of the mortgage. For instance, supposing the contract had been to this effect, that the

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mortgage should be for £14,000, and that the mortgagor should pay interest at £4 per cent., and that if it was not paid on the day he should pay £6 per cent., such a contract would be bad; there are direct authorities to shew that that cannot be done. But this can be done, which in substance amounts to the same thing, the parties may agree that the interest shall be £6 per cent., and that if it is paid on the day the mortgagee will accept £4 per cent. in lieu of the £6 per cent. It cannot be put in the way of a penalty.

The Plaintiffs have got all that they contracted for, namely, £33,000 actually paid, and the mortgage for the £14,000; and it is to be observed that they get all the advantage. It is certain that as they had no personal interest themselves in the matter, and were only trustees for their shareholders, if they could have enforced, or thought they could have enforced, payment of the £54,000, they would have done so, but they thought it beneficial to accept, out of Lord *Downe's* purchase money, the £33,000, and take a mortgage for the £14,000. Having got the mortgage, they might, when the money became payable under the proviso for redemption, have sued *Hudson,* they might have got a judgment, they might have got execution, they might have enforced the payment of the money in any form they pleased, or filed a bill for foreclosure, and obtained a foreclosure of the equity of redemption of the property; but instead of that, they say they will have a penalty, that is to say, he shall pay £40,000 instead of the £14,000. Does the fact that there was £40,000 originally due, which they had given up in consideration of this agreement being entered into, make any difference? I am of opinion that it does not. Whether it was that the conveyancer did not like to put it in that form, or that *Hudson* would not have agreed to a mortgage for £40,000 to be reduced to £14,000 on payment within a specified time, I do not know, but in the form in which the deed stands, I am of opinion that this is a case in which the Court will relieve against the penalty, or rather, will not enforce the penalty, and that the Plaintiffs cannot recover more than £14,000 and the interest thereon. In fact, the cases cited by the counsel for the Plaintiffs exactly support the distinction, that you may always agree to give up a large sum on a smaller sum being paid

down, but you cannot, in default of a smaller sum being paid down, insist on a larger sum being paid. The result is, that in taking the account I shall take it on the footing which I now state, and I shall not allow anything beyond the £14,566 7*s.* 6*d.* for which the mortgage is given.

As regards the £75,000, I am of opinion that *Hudson* is clearly bound; it is impossible for him to get over the deed by which he has assented to the transaction taking place; but I do not see how the subsequent mortgagees can be affected by it, and, indeed, I do not want them here to argue the question. The question is this:—The two trustees, *Philipson* and *Wright*, were empowered to raise £75,000 for the purpose of paying off four mortgages. There is no question but that if they had borrowed that money from the railway company and had thereupon paid off these four mortgages, and had got the transfer of the legal estate and the release of the mortgages, and so made the company the first mortgagees, the company, who had advanced the £75,000, would have been entitled to charge interest upon the whole amount of that capital. But what they have done is this; the company have paid off the four mortgages and they have got those mortgages transferred, not to the trustees of the deed of the 20th of October, 1854, but to their own trustees, which is the same thing as if they were transferred to the company itself. But what is transferred to them? only that which the mortgagees could transfer, which was a certain amount of capital and so much arrear of interest. The company stand in the place of the mortgagees, and it does not matter whether it was one mortgage or four; they stand simply in the place of the original mortgagees. Then the trustees, *Philipson* and *Wright*, apparently by the desire of *Hudson*, endeavoured to put the company in the same situation as if they had advanced £75,000 to the trustees, and the prior mortgages had been paid off by the trustees; but they could not do this, they had not the power of doing it, and they merely transferred to the trustees of the company all their rights and interests. If the railway company had afterwards borrowed the £75,000, and paid off the prior mortgages, it is possible that the parties from whom they borrowed the £75,000 might be entitled to interest on the whole £75,000 claim, but they cannot make such a claim. They are in the situation merely of

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the original mortgagees as against the persons who have subsequent incumbrances, and accordingly, with respect to these persons, I shall take the account on that footing. But, as to the final equity of redemption, I shall hold *Hudson* bound by the deed of 1857. I think all the costs of this summons must be costs in the cause; the matter could not have been disposed of without the decision of the Court.

Solicitors for the Plaintiffs: Messrs. *Williamson, Hill, & Williamson,* agents for Messrs. *Newton, Robinson, & Brown, York.*

Solicitors for the Defendants: Messrs. *Elmslie, Forsyth, & Sedgwick.*

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V.-C. K.
1866
July 26.

Administration—Will—Marshalling—Pecuniary Legatee—Residuary Devisee.

Since the *Wills Act* a residuary devise of real estate can no longer be treated as specific.

A general pecuniary legatee has a right of marshalling as against the residuary devisee of real estate.

WILLIAM CURTIS, by his will, dated the 17th of January, 1851, directed his trustees to sell certain real estates therein described; and he gave and bequeathed all his personal estate and effects to his trustees upon trust, as soon as conveniently might be after his decease, to sell, dispose of, and convert into money so much of his said personal estate as should be in its nature saleable, and to collect and get in the residue thereof; and he declared that his trustees should stand possessed of the moneys to arise from the sale of the said freehold hereditaments and premises so directed to be sold, and the rents thereof, until sale, and also from the sale, collection, and receipt of his personal estate thereinbefore bequeathed, upon trust out of the same moneys to pay all his debts, including mortgage debts, funeral, and testamentary expenses, and the legacy of £50 thereinafter bequeathed to his wife, and stand possessed of the remainder or surplus of the moneys, so to arise as aforesaid, upon trust for his grandson, *J. Curtis*, in case he should live to attain twenty-one; and in case he should die under that age, then upon trust for certain persons therein mentioned. And the testator devised his messuage in *Mile End* to the said *J. Curtis*, his heirs and assigns for ever, subject to residence rent free for his (the testator's) wife, and after her decease, for his daughter-in-law. And he devised all and singular other his messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, whether freehold, copyhold, or of a customary, or any other tenure, with their appurtenances (but nevertheless charged in manner thereinafter mentioned), unto his said grandson, *J. Curtis*, his heirs and assigns for ever; and he gave and devised to his wife during her life, the annual sum of £120,

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and he charged the same on all and singular the hereditaments and premises lastly devised to his grandson, *J. Curtis*. And the testator gave and bequeathed to his granddaughter, the Plaintiff *Rebecca Hensman* (then *Rebecca Curtis*), the sum of £2000, when she should attain the age of twenty-one years; and he directed that the said legacy should not vest in, or be paid to her, unless she should attain that age; and the testator gave and bequeathed to his wife all his household furniture, books, plate, linen, and china, and he also bequeathed to her the sum of £50, to be paid to her out of his personal estate immediately after his decease.

The testator died on the 15th of October, 1857.

Rebecca Curtis married the Plaintiff, *John Hensman*, on the 7th of November, 1861, and she attained the age of twenty-one on the 28th of June, 1862.

Shortly after *Rebecca Hensman* attained twenty-one she and her husband applied to the trustees of the will for payment of the legacy of £2000 bequeathed to her; but they refused payment on the ground that they had no assets in hand, and that the testator's personal estate was insufficient for payment of his debts; but an arrangement was made that interest at £5 per cent. should be paid upon the legacy until the testator's grandson, *J. Curtis*, should attain the age of twenty-one, and this was accordingly done.

The Defendant, *J. Curtis*, the grandson, attained his age of twenty-one years on the 3rd of February, 1864, but refused to pay the said legacy or any part thereof; the trustees still alleging that the testator's personal estate was insufficient for payment of his debts, and *J. Curtis* insisting that the real estate devised to him was in nowise charged with, or liable in respect of, the legacy of £2000.

This bill was thereupon filed by *John Hensman*, and *Rebecca Hensman*, his wife, against *J. Curtis*, and the trustees of the will, and it charged that the real estate devised upon trust for sale, for payment of the testator's debts, and funeral and testamentary expenses, and the legacy of £50, ought to be applied in payment of such debts and legacy in priority to the personal estate; and also that the legacy of £2000 was charged upon the residuary real estate devised by the will to *J. Curtis*, or, at all events, that the residuary

real estate was applicable to the payment of the legacy of £2000; and the bill prayed the usual accounts of the real and personal estate, and payment of the legacy of £2000, and that the real and personal estate might be applied and marshalled accordingly.

Mr. *Baily*, Q.C., and Mr. *Shebbeare*, for the Plaintiffs:—

Since the *Wills Act* a residuary devise of real estate is no longer specific, and, therefore, the Plaintiff has a right of marshalling against the residuary devised real estate. In *Dady* v. *Hartridge* (1), where the personal estate proved deficient for the payment of debts, the real estates devised by way of residue were held chargeable with the payment of debts, in priority to the real estates specifically devised. This decision was followed in *Barnwell* v. *Iremonger* (2), and in *Rotheram* v. *Rotheram* (3), the Master of the Rolls came to a similar conclusion.

In *Lord Lilford* v. *Powys Keck* (4), the Master of the Rolls decided that pecuniary legatees were entitled to stand in the place of the vendor against an estate purchased and devised by the testator, the purchase-money for which was paid after the testator's death out of his personal estate, and in a recent case not yet reported, Vice-Chancellor *Wood* held that pecuniary legatees were entitled to have their legacies paid in priority to the mortgage debts as against the devisee of the mortgage property. There is nothing in this will to affect the right of *Rebecca Hensman* to marshal the assets as against the residuary devisee.

Mr. *Woodhouse*, for an incumbrancer upon the Plaintiff's legacy, cited *Rodhouse* v. *Mold* (5), and *Mirehouse* v. *Scaife* (6).

Mr. *Glasse*, Q.C., and Mr. *Bristowe*, for the Defendant:—

Marshalling is not only because there are two funds from which a legacy may be taken; but it is to carry out the intention of the testator, and it could not have been the intention in this case that the legacy should come out of the real estate. Where the testator

(1) 1 Dr. & Sm. 236.
(2) Ibid. 242.
(3) 26 Beav. 465.
(4) Law Rep. 1 Eq. 347.
(5) 35 L. J. (Ch.) 67.
(6) 2 My. & Cr. 695.

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intended to charge the real estate he did so, as in the case of the annuity of £120 to his wife. If he had meant the £2000 to be charged upon his real estate he would have specified it. By directing his debts to be paid out of his personal estate, the testator has done away with the right of marshalling, if there would otherwise have been such a right. If the rule as to marshalling is to carry out the testator's intention, it would not do so in this case, because then the devise to the grandson would in fact fail, since it would be charged with a heavy legacy; and why is one part of the intention to be executed and not the other?

It is submitted that the devise to the grandson is not a residuary devise. There is a gift of one portion of the freehold estate to the same person, subject to debts and legacies, and then a devise of all and singular other his messuages and tenements, which must have alluded to certain other estates which he had not before specified. The decisions in the cases of *Dady* v. *Hartridge* (1), and *Rotheram* v. *Rotheram* (2), have been questioned; and in *Eddels* v. *Johnson* (3), *Pearmain* v. *Twiss* (4), and *Clark* v. *Clark* (5), Vice-Chancellor *Stuart* decided the point in a manner at variance with the Plaintiff's contention, and in conformity with *Emuss* v. *Smith* (6).

Mr. *Baily*, in reply.

July 26. SIR R. T. KINDERSLEY, V.C.:—

The question which arises in this case is one of general importance, and now, for the first time, comes for decision by the Court, namely—whether a general pecuniary legatee has a right of marshalling as against the residuary devisee of real estate. There is another subordinate question, whether, supposing such right generally to exist, there is anything in this particular will to affect such right? [The Vice-Chancellor stated the will, and continued:—]

It turns out that the personal estate, and the proceeds of the

(1) 1 Dr. & Sm. 236.
(2) 26 Beav. 465.
(3) 1 Giff. 22.
(4) 2 Giff. 130.
(5) 34 L. J. (Ch.) 477.
(6) 2 De G. & Sm. 722.

6 Jur N S 337
5 Jur N S 402
4 Jur N S 255
10 Jur N S
(5) 4 Giff 702

sale of real estate devised to be sold for payment of debts, are together insufficient to pay the debts, and, therefore, that there is no personal estate applicable for payment of the £2000 legacy to Mrs. *Hensman*, unless the principle of marshalling is applicable; and it is insisted, on her part, that since the *Wills Act* there is a right of marshalling in favour of a general pecuniary legatee as against the residuary devisee of real estate.

There being no authority directly in point, the question must be decided on principle.

Before the late *Wills Act*, general pecuniary legatees had a right of marshalling as against descended real estate; so that if the personal estate was insufficient for payment of the debts and legacies, the legatees were entitled to come upon the descended real estate to the extent that the personal estate had been exhausted by creditors. But although there was this right of marshalling as against descended real estate, there was, of course, no such right as against specifically devised real estate; and not only was there no such right as against real estate specifically devised in form, that is, mentioning specifically the particular lands and hereditaments devised; but there was also no such right as against real estate devised in a residuary form, as "all my real estate," or "all other my real estate;" the reason being, that such a devise, though in form residuary, was in substance and effect as much specific as if the lands and hereditaments devised had been specifically mentioned; and that was the only reason. For it was a well known rule of law before the *Wills Act*, that a devise of real estate, though in form general and residuary, would only pass the estates of which the testator was seised at the date of his will, and, moreover, that it would not comprise any real estates devised in a specific form, the devises of which lapsed, or otherwise failed; so that the devise, though residuary in form, had none of the characteristics or qualities of a residuary devise; and, therefore, it was held to be specific; and because it was held that such devise was specific (and for that reason only), it was held there was no right of marshalling. In the case of *Mirehouse* v. *Scaife* (1), the Vice-Chancellor of *England* actually decided that a pecuniary legatee had the right of marshalling as against a residuary devisee of

(1) 2 My. & Cr. 695.

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real estate; and although Lord *Cottenham* reversed that decision, he assigned no other reason why the Vice-Chancellor's view was not correct, than that the devise, though residuary in form, was in effect specific. In truth, before the *Wills Act*, the rule of law did not prevent marshalling in favour of a pecuniary legatee as against real estate; it only forbade marshalling as against real estate specifically devised. As I have before observed, the Court would marshal as against real estate descended; and, moreover, it gave the right of marshalling to a general pecuniary legatee as against the devisee of real estate subject to a mortgage, so that if the mortgagee chose to resort to the personalty for payment of his mortgage debt, the pecuniary legatee had a right to stand in the shoes of the mortgagee as against the mortgaged estate, even though specifically devised.

That being the state of the law before the passing of the *Wills Act*, what has been the effect of that Act? There is a difference of opinion on the question, whether a devise of real estate, in form residuary, is still to be treated, as before, as specific, or as residuary? *Dady* v. *Hartridge* (1), was, I believe, the first case in which the question arose; and, after much consideration, I arrived at the conclusion, that the effect of the *Wills Act* was, that a residuary devise ought no longer to be treated as specific, as it had formerly been; and for this reason, that whereas under the old law, a devise of realty, in a residuary form, had no one quality of a residuary gift, inasmuch as it did not pass after-acquired real estate, nor any specifically devised real estate of which the devise lapsed or failed,—now, by the *Wills Act*, a residuary devise will comprise all the real estate the testator may be seised of at the time of his death; and, moreover, all real estates specifically devised, where the devises lapse or fail, will fall into the residuary devise of real estate. So that the effect of the *Wills Act* has been to make a devise of real estate which is residuary in form, residuary also in substance, and to partake of every quality of a residuary gift.

The question subsequently came before the Master of the Rolls and the Vice-Chancellor *Stuart*. The Master of the Rolls adopted the same view as that which I had taken; but the Vice-Chancellor *Stuart* took a different view, and considered that, notwithstanding

(1) 1 Dr. & Sm. 236.

the *Wills Act*, a residuary devise of realty must still be treated as specific. Until the question is settled by higher authority, I must adhere to the view I took in *Dady* v. *Hartridge* (1).

Mr. *Glasse* here observed that in a later case of *Bethell* v. *Green* (2) the Master of the Rolls had again taken the same view as before.

The VICE-CHANCELLOR :—That is satisfactory, as it confirms the view which I take.

It must be observed, however, that *Dady* v. *Hartridge* only went to this extent, that where real estate had to pay debts, the residuary devised estate is primarily liable to bear them in exoneration of the specifically devised estate.

The question now to be decided is this : If a devise residuary in form, is now to be treated as residuary in substance, and not as specific, what ought to be the effect on the question of marshalling in favour of general pecuniary legatees ? when I consider that the doctrine of marshalling is founded in equity and justice, and when I find that the only reason why the Courts before the *Wills Act* did not give the right of marshalling to general pecuniary legatees was that the devise, though in form residuary, was in effect specific, and that reason no longer exists, the necessary consequence seems to me to be, that the only impediment to the application of the equitable principle being removed, there is now the right of marshalling as against real estate devised in a residuary form.

The other question in the case is, whether there is anything in this will which affects the right of marshalling. It is argued on the part of the Defendant that the testator, in directing the proceeds of the personalty, and of the real estate directed to be sold, to be applied in payment of his mortgage and other debts, and funeral and testamentary expenses, must have intended something more than what would have been the effect by operation of law if he had given no direction on the subject. But whatever might be the force of that argument if the direction had related only to the personalty, it can have no force here, because the direction relates not merely to the personalty, but also to the real estate

(1) 1 Dr. & Sm. 236. (2) 34 Beav. 302.

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devised to be sold, which would not necessarily, by operation of law, have been applicable with the personalty to the payment of debts. It appears to me that there is nothing in this will to prevent the application of the principle of marshalling.

The pecuniary legatee must be declared entitled to marshal as against the residuary devisee of the real estate, and the necessary directions must be given for carrying that declaration into effect.

Solicitors for the Plaintiff: Messrs. *Hensman & Nicholson.*
Solicitors for the Defendants: Messrs. *Ravenscroft & Hills.*

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CHURTON *v.* FREWEN.

Chancel in a Church—Prescription—Immemorial Use and Occupation—Reparation.

Upon bill filed to establish a right to a chancel as part of the parish church, against the lord of the manor, who claimed it as appendant to the manor or manor-house, it appearing that the chancel was an ancient chapel, coeval with the church; that it was a private chapel erected by the lord of the manor:—

Held, that immemorial use and occupation, coupled with reparation, entitled the lord of the manor by prescription to the perpetual and exclusive use of the chancel; and that this right might exist, notwithstanding that the freehold might not be in the person prescribing, and although the estate or house to which the chancel was appendant might not be situate in the parish.

THE question raised in this suit was as to the right and title to a certain chancel situated at the south-east corner of the parish church of *Icklesham*, which presented the appearance of forming part of the area and fabric of the parish church. The Plaintiffs insisted that it in fact formed part of the church, while the Defendants claimed it as a chapel appurtenant to the manor of *Icklesham*, or to the manor-house of *Icklesham*; and as lord or lady of the manor, they claimed to have a right to the exclusive user of it.

The form of *Icklesham Church* was as follows:—It consisted of a nave and two aisles, the north aisle and south aisle; and at the end of these were three chancels—the chancel proper at the end

of the nave, the vicar's chancel at the end of the north aisle, and a third chancel (the subject of the present suit) at the end of the south aisle. This south chancel was divided from the middle, or chancel proper, by pillars supporting arches, and there was no access to the area in question but through the body of the church. The nave and two aisles of the church were under one roof, the chancel proper under another roof at a lower elevation than the roof of the nave, the vicar's chancel under another roof, and the south chancel (the one in question) under a fourth roof.

The Plaintiffs were the vicar; the vicar's churchwarden; two infants, inhabitants of the parish, by the ordinary, the Bishop of *Chichester*, as their next friend; and the said bishop as a separate Plaintiff; and the Defendants were Mr. and Mrs. *Frewen*, Mrs. *Frewen* being tenant for life of the manor of *Icklesham*, under the will of a former husband, and being, as such, entitled to a house called *New Place*, in the parish; the trustees of a settlement made prior to the marriage of Mr. and Mrs. *Frewen*; the person entitled in remainder to the manor and to *New Place*, which it was alleged was the manor-house; and the Ecclesiastical Commissioners for *England*, as being the rectors of the parish.

The chancel in question comprised about one-fifth of the whole area of the church; and the vicar having had benches placed there for the use of the congregation, Mr. *Frewen* objected to this as being in derogation of the rights which he claimed of exclusive user. This led to disputes; and actions were commenced in the county court for trespass, one of which was removed by *certiorari* to the Court of Queen's Bench; and pending this action the present suit was instituted by the vicar to quiet his right.

Some discussion took place as to the frame of the suit, and the Vice-Chancellor, in his judgment, commented on it, and on the question whether the bill could be sustained as a bill of peace. But the Defendants raising no objections on these points, and the decision of the case not depending on them, it is unnecessary to refer to them further in this report.

The evidence as to the architectural structure, and as to who were the founders of the church and chancel in question, and as to the title of the Defendants, Mr. and Mrs. *Frewen*, to the manor of *Icklesham*, was very voluminous: but its effect, and the con-

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clusions at which the Vice-Chancellor arrived, are sufficiently stated in his Honour's judgment.

Mr. *Glasse*, Q.C., and Mr. *Wintle*, for the Plaintiffs:—

The Defendants are bound by the admission in their answer, that the freehold in this chancel is in the Ecclesiastical Commissioners as rectors, which admission the Court refused to allow them to correct by a supplemental answer; and they cannot, by the affidavits they have filed, get rid of the effect of that admission.

But even if no such admission had been made, they could not claim the freehold in the chancel, which is a part and parcel of the fabric of the church, and, according to the law of this country, no lay individual can be seised of the freehold in any part within the fabric of the church, and that is the claim set up by the Defendants: *Comyn's* Digest (1).

If the Defendants then are not seised of the freehold in this chancel, their right to the use of the chapel or chancel must be in the nature of an easement. At law, if an action were brought to try the right to the freehold, it would be an action of trespass: but if an action were brought to try the right to the use, by way of easement, to sittings in a church, or a right of burial, it would be by action on the case for disturbance of such easement. Banners, or the materials of a pew, to the exclusive right of which a person is entitled, may be the property of an individual, though attached to the freehold, and trespass would lie for them; but if the Defendants are entitled to this chancel at all, it must be by way of easement, and such easement may be acquired either by faculty or prescription. The Defendants do not claim by faculty, and, therefore, it must be by prescription. If by prescription, it must be founded on continuous user, which is not proved in this case. Moreover, such an easement can only be appurtenant to a house with respect to its inhabitants, and does not attach to land, and if the inhabitant goes away he does not carry the right away with him: *Co. Litt.* (2); *Coke's* Institutes (3);

(1) Title Eglise, G. I. (2) 185.
(3) 2, 202.

Corven's Case (1); *Hussey* v. *Leighton* (2); *Shambrok* v. *Fettiplace* (3); *Polden* v. *Bastard* (4).

A faculty to a man and his heirs of a pew or aisle in a church is not good: *Stocks* v. *Booth* (5); *Clifford* v. *Wicks* (6); *Griffin* v. *Dighton* (7); and an action at common law will not lie for a pew or for an aisle unless it be attached to a house, and the house must be an ancient house: *Mainwaring* v. *Giles* (8); *Bryan* v. *Whistler* (9); and there is no distinction between right to a pew and right to an aisle: *Bunton* v. *Bateman* (10); *Crook* v. *Samson* (11); *Dawney* v. *Dee* (12); *Perrivall's Case* (13); *Gale* on Easements (14); *Stephens'* Common Prayer (15); *Waring* v. *Griffiths* (16); *Wyche's Case* (17); *Burns'* Ecclesiastical Law (18); *Rogers'* Ecclesiastical Law (19); *Blackstone's* Commentaries (20); *Rennell* v. *Bishop of Lincoln* (21).

If the chapel was a private one, by the Act of 1 Edw. 6, c. 14, following the Act of 37 Hen. 8, c. 4, it was given to the Crown; and the onus lies on the Defendants to shew that it was an endowed chapel in derogation of common right: *Hook's* Church Dictionary, Articles—"Church Architecture," "Chancel," "Chapel."

Although the freehold is in the rector, the right to the corporal possession is in the spiritual incumbent, and the lay rector has no right, as against the vicar, to the possession or control of the chancel, or any part of it.

The Defendants insist that they are entitled to the chancel by reason of their having always repaired it; but they have not proved that they have always repaired it; and if they have done so, the exclusive use of the chapel does not follow as a necessary consequence—it may be an obligation imposed on their estate as a *modus* in lieu of tithes, or for some other reason, and such

(1) 12 Rep. 105.
(2) Cited in 12 Rep. 106.
(3) 2 Mod. 283.
(4) 2 N. R. 356.
(5) 1 T. R. 428.
(6) 1 B. & A. 498.
(7) 5 B. & S. 93.
(8) 5 B. & A. 356.
(9) 8 B. & C. 288.
(10) 1 Sid. 88.
(11) 2 Keb. 92.
(12) 3 Cro. Jac. 604.
(13) Coke's Entries, 8.
(14) Page 536, note (*d*); pp. 539, 540.
(15) Vol. i. p. 331, 337.
(16) 1 Burr. 440.
(17) 12 Rep. 105.
(18) 9th ed. vol. i. p. 358.
(19) Page 147.
(20) Page 23.
(21) 7 B. & C. 113.

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modus would be good: *Degges'* Parson's Counseller (1); *Coote's* Ecclesiastical Practice (2).

There may be the onus to repair without a *beneficium*, or corresponding advantage, though, in order to claim the benefit, it is necessary they should prove repair. The constant user, for the purpose of attending divine service, and for burying, would not be sufficient without repair: *Bunton* v. *Bateman* (3).

If they have proved repair, there is still the question whether the mere fact of repairing will prove the right set up by the Defendants.

Mr. *Lindley*, for the Ecclesiastical Commissioners, who were Defendants to the bill, but supported the contention of the Plaintiffs:—

If Mr. *Frewen* had confined his claim to prescriptive right for himself and his family, as inhabitants of the manor-house, to sit in the south chancel and be buried there, it would not have been of much consequence which way the Court decided; but the claim goes to this—that he and his successors, the lords of the manor of *Icklesham*, are entitled to the whole of the south chancel as their own absolute property, to the exclusion of all the parishioners. Now as the south chancel is one-fifth of the entire structure, it is of great importance to the Ecclesiastical Commissioners that such a claim should not be allowed, since, if the present accommodation should at any future time become insufficient, as it probably will, it would be necessary to build a new church. The claim set up by the Defendants is altogether without precedent, and no trace can be found of a similar one in any of the books either of common or ecclesiastical law. It is clear from the photographs of the building that the south chancel is part and parcel of the main fabric. *Primâ facie*, therefore, the legal ownership of the whole is in the rector, and the beneficial enjoyment must belong to the parishioners; consequently the onus lies upon Mr. *Frewen* to establish his title. There is nothing in the evidence to shew any ownership of the Defendants in the chancel. It is a matter of fact that no right of possession has been exercised in the shape of maintaining a pew in that chancel, and the only approach to a

(1) Page 213. (2) Page 146. (3) 1 Lev. 71.

right of burial is the fact that one person, *Arnold Nesbit*, directed by his will that his body should be buried in the chapel of *St. Nicholas*, which it is alleged was intended to designate the chancel in question; but it is not proved that this direction was ever complied with. It is true there is a tablet erected to the memory of one of the lords of the manor, and it may be concluded that he was buried there; but no doubt this burial took place with the sanction of those who had a right to prohibit it. As regards the repairs, though it may be proved as a matter of fact that the lords of the manor have been in the habit of repairing the chancel, others have been called upon by the ecclesiastical authorities to effect such repairs; the legitimate inference from that is, that the chancel is annexed to the house; but they have failed to shew the connexion with any particular house. There cannot be a prescriptive right to part of a church without its being connected with a house. The old manor-house is *New Place*, but there is no evidence to connect the repairs with the owners of that house. Mr. *Frewen* is not the inhabitant of that house, and the present owners do not assert any right to the chancel. Mr. *Frewen* says he claims in right of his wife, but it is impossible to hold that any such right exists.

Mr. *A. J. Stephens*, Q.C., Mr. *Charles Hall*, and Mr. *Traill*, for the Defendants:—

The Defendants claim the exclusive use and enjoyment of the manor chancel in *Icklesham Church* as a private chapel, to the exclusion of all persons at all times, provided it be not used for profane and secular objects. In support of that claim we contend for the maintenance of four propositions. First, that what is commonly known as the manor chancel is a private chapel, and never was an integral and component part of the church or of the chancels thereof. Secondly, that the lords of the manor of *Icklesham* have from time immemorial repaired that chancel. Thirdly, that they have immemorially enjoyed its exclusive use and occupation. And fourthly, that the exclusive use and occupation of a private chapel annexed to a church, coupled with the reparations, from time immemorial is not inconsistent with the laws ecclesiastical. In reference to the first proposition, unless the Plaintiffs can establish the allegation that these three chancels are one chancel,

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none of the authorities which have been cited have any application in reference to the determination of this question. The documentary evidence establishes that the manor chancel is no part of the large or principal chancel of the church. That view is supported by the statement in the archidiaconal visitation that "the little chancel at the north side wants repairing, but we cannot learn who ought to repair it." That extract disposes of the allegation in the bill that the three chancels are one. If the chancel was one entire chancel there would have been no difficulty as to the repairs of any one part of it. So again, in a subsequent visitation in the year 1681, it is stated, "The chancel on the south side of the church is out of repair, but it is not known who is to repair the same," and so on in similar subsequent presentments in 1682 and 1683, shewing clearly that this outside chancel was a distinct chancel. It has been said that there is no trace of a main wall between the south chancel and the main chancel. That is quite true, and it is a common case in respect of these private chapels annexed to churches. They were used for private prayer, but they were also used for the purpose of hearing high mass where there was no endowed chapel, and very few chapels annexed to churches were endowed. They differed entirely from the free chapels which were not annexed to churches, but were built as chapels of ease.

There is, however, a screen of stonework, and thus the chapel is as much divided from the rest of the church as if a permanent wall had been built. If the Plaintiffs could shew that these three chancels were one, then the Defendants could not claim exclusive use and occupation, because in every church where there is a chancel the vicar has certain duties to perform, and no right can exist in any part of the church which is inconsistent with the provisions of the Book of Common Prayer. The communion table is, by the Prayer Book, to stand in the body of the church, where prayer is appointed to be said, and it is expressly forbidden to have two high altars and two services proceeding at the same time: *Burns'* Ecclesiastical Law, by *Phillimore* (1), title "Monastery;" The Rubric in the Prayer Book. All the articles of visitation, when dealing with the purposes of prayer, or the offices of the church, speak only of chancels and naves of churches, and

(1) 9th ed. vol. ii. p. 521.

never of the aisles or private chapels: *Hook's* Church Dictionary, title "Pews" (1); *Johnson's Vade Mecum* (2); all the offices of the church are directed to be performed either in the chancel or the body of the church. This is the case throughout the entire Book of Common Prayer, which was enacted in 1662. The rights which noblemen had in the smaller chancels were distinct from those of the ordinary in respect of the great chancel. The ordinary had no power to order prayers to be said in noblemen's chancels, he could only order prayers in the great chancel. A layman may have an exclusive right to a pew or a chancel if it does not interfere with divine service, or he may have an exclusive right to a pew in the nave of the church by prescription: *Kennett's* Parochial Antiquities (3). The word chancel has crept into use in modern times. Down to the reign of Queen *Elizabeth*, and during that reign, the proper term "chapels" was used in all the records, but subsequently the word "chancel" was brought into use. The reason was, that these chapels were used for Roman Catholic purposes; and when the Reformation took place, there was no longer the same use for those chapels.

There are various customs and privileges existing in parochial churches in reference to pews in chancels, in naves of churches, and in aisles, and all of them exist in derogation of the general rights of the ordinary—and this fact is in support of the Defendants' claim—and the owner of such privileges would have a right of action against the ordinary. The Defendants claim their right by prescription. Prescription may be in respect of person or estate, and it was held in *Lousley* v. *Hayward* (4), that a man may have such a right, even a freehold by prescription, in the chancel; and there is nothing in the laws ecclesiastical inconsistent with that view. The original founder may have reserved a particular part of the church for himself, and be entitled to deal with it in gross. If he has had undisputed enjoyment of it from time immemorial, and has repaired it, there is nothing inconsistent with any principle of ecclesiastical law if he claims that as his freehold. If there has been undisputed enjoyment coupled with reparation, the Court will assume a legal origin, and this may be

(1) Page 583.
(2) 6th ed. p. 269.
(3) Page 596.
(4) 1 Y. & J. 583.

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the case in respect of non-parishioners as well as parishioners: *Archer* v. *Swetnam* (1); *Fuller* v. *Lane* (2); *Godolphin's Repertorium* (3); Parson's Law, by *Hughes* (4); *Watson's* Clergyman's Law (5); *May* v. *Gilbert* (6); *Davis* v. *Witts* (7); *Browne's* Ecclesiastical Law (8). By these authorities it is submitted that the following three propositions are established:—First, that aisles or parts of aisles may be private property; secondly, that they may be appurtenant to a house out of the parish; and thirdly, that they may be prescribed for by an inhabitant of another parish.

Then, as to the law and practice in reference to private chapels: many of these have been excepted, or not included, by the founders of churches at the time of the foundation; others were built by license from the Crown, with peculiar exemptions, and are independent of the ordinary: Parson's Law, by *Hughes* (9); *Nelson's* Rights of the Clergy (10). The only question is, whether this claim has a legal origin? What the Defendants contend is, that this is a private chapel, and that it is exempt from visitation by the ordinary: *Highmore* on Mortmain (11); *Collier's* Ecclesiastical History (12); *Watson's* Clergyman's Law (13); *Stephens's* Laws of the Clergy (14). The ordinary may be excluded from seating persons in a chapel used for a private purpose: *Degge's* Parson's Counsellor (15). A bishop has no right to seat people in a chapel which is not repaired at the public charge: *Brandon's* Parish Churches; *Bloxam's* Gothic Architecture (16); *Bloxam's* Monumental Architecture (17). It is not necessary that such a chapel as this should be appendant or appurtenant to a house. The right does not depend on inhabitancy, for it is independent of the ordinary, and is not governed by the cases cited, which apply to pews, and where all the rights are derived from the ordinary.

(1) 8 Mod. 338.
(2) 2 Addams, Eccl. Rep. 433.
(3) 2nd ed. p. 136.
(4) 2nd ed. p. 307.
(5) Page 388.
(6) 2 Bulstrode, 151.
(7) Forest, Rep. 14.
(8) 2nd ed. p. 179.
(9) Page 307.
(10) 3rd ed. p. 162.
(11) 2nd ed. p. 33.
(12) Vol. v. p. 227.
(13) 4th ed. pp. 337, 389.
(14) Vol. i. pp. 249, 251.
(15) 7th ed. p. 213.
(16) 10th ed. pp. 422—426.
(17) Page 178.

We confess that we do not know, and do not shew the origin of the right we claim; but we shew an immemorial use and occupation, coupled with reparation; and it is of no consequence whether we are lords of the manor or not. It may be that the Defendants are seised of the fee simple of the soil of this chapel; a man may have the freehold in a chapel separate from the church, and an aisle may be built upon the separate property of a private individual, and the land upon which this chapel is built may have formed part of the private property of the Defendants' ancestors. The customs ecclesiastical are very irregular, and it may be that we had a license from the Crown, when the church was consecrated, to build a chapel attached to the fabric, and this is not unlikely, since the pillars between this chapel and the body of the church appear to point out the boundaries of the two freeholds. We maintain that this is, at any rate, our private chapel; that it has never been used for public purposes; and that a distinct and separate character of a chapel may exist, though affixed to a church: *Coke's* Institute (1); *Burn's* Ecclesiastical Law, by *Phillimore*, "Church" (2).

We therefore submit that we have established these five propositions as resulting from the authorities: 1st. That private chapels may have been excepted, or not included, by the founder at the time of the foundation of the church, or they may have been built by licence from the Crown independent of the ordinary and with special exceptions. 2nd. That the bishop has no power to dispose of the seats of any private chapel annexed to the church, and which is not repaired and maintained at the charge of the parish. 3rd. That private chapels were often distinct from the church, and erected at different periods of time. 4th. That the objects of private chapels were exclusively for private and not for public worship. 5th. That the incumbent of the parish had no duties to discharge within those private chapels.

Having shewn the existence of these private chapels, we now proceed to prove that this particular chapel will be found to have all the component parts of a private chapel, and the uses for which it was employed were precisely such as a private chapel would be applied to in the early period of our ecclesiastical

(1) Vol. ii. p. 489. (2) Vol. i. p. 356.

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history. Thus it had a mass-table, a piscina, a sedile, and a burial-place for the owners of the chapel. All these are shewn by the evidence to have existed, and they are always to be found in private chapels: *Hook's* Church Dictionary (1). There were usually three sediles at the high altar, and only one in a private chapel, which is the case in this chapel: *Johnson's Vade Mecum* (2); *Amos* on Fixtures (3).

The next branch of the case is, that from time immemorial, the lords of the manor have, from some cause or other, repaired the south chancel, commonly called the manor chapel, and there is no evidence that the parish have ever repaired it. The evidence in the case sufficiently proves this allegation, and it goes back for a period of 273 years. If a person has a private chapel, he is bound to keep it in repair, and every owner of this chapel is liable to the obligation: *Nelson's* Rights of the Clergy (4).

We now come to the next proposition, which is, that by general reputation amongst the oldest inhabitants of the parish, the south chancel is the property of the lord of the manor of *Icklesham*, and we shew by the evidence that we have repeatedly exercised specific acts of ownership, such as erecting a hatchment and a monument: *Maidman* v. *Malpas* (5); *Palmer* v. *Bishop of Exeter* (6). No person has a right to set up a hatchment in a church without having obtained a faculty for the purpose.

The acts of ownership relied upon by the Plaintiffs are these: that they have, as of right, appropriated seats in the manor chancel; that they have cleansed the chapel, and that they have left there the ladders and the parish chest. They also allege that the lord and lady of the manor do not sit in the chancel, and are not inhabitants of the parish, and that the congregation cannot be conveniently seated without this chapel. There is no proof that any of these acts of ownership have taken place with the knowledge of the lord of the manor, or without his sanction; and, on the other hand, there are many facts shewing the recognition by the Plaintiffs of the Defendants's right to the exclusive use of the chapel. It is impossible to conceive a case in which a right has

(1) 9th ed. p. 22.
(2) Page 19.
(3) Page 204, n. (*b.*)
(4) Page 162.
(5) 1 Hag. Con. Rep. 208.
(6) 1 Str. 575.

been more clearly and unequivocally recognised; and there are many instances in which the Defendants have asserted their right. On the 5th of May, 1863, a parish meeting was held in the manor chapel, and when the Defendants heard of it they commenced an action for trespass in the County Court against the Plaintiff, and on the 18th of May, 1863, judgment was given in favour of the present Defendants. That judgment at the present time stands in full force, and has not been appealed from. In consequence of that judgment, recourse was had to the opinion of Counsel, which turned out to be adverse to the Plaintiff's claim, and then followed a document, being an entry in the parish books, acknowledging the property of the Defendants in the chancel, and stating that no future use would be made of it by the parish without the Defendants' sanction. That document was signed by two of the present Plaintiffs, Mr. *Churton*, and his churchwarden, Mr. *J. Smith*, and by the entire vestry; and it was forwarded to Mr. and Mrs. *Frewen*, with a letter assuring them that there was no desire on the part of the vestry to question the right of the lords of the manor, who had from time immemorial performed all necessary reparations. The vicar and churchwardens at the same time acknowledged the Defendants to be the exclusive owners of the aisle or chancel known as the manor chancel. They also requested permission to make use of the chancel to seat the children, and any other persons in it, during divine service. This permission was granted by the Defendants, with a provision that an acknowledgment should be entered in the vestry-books. A meeting of the vestry was then held, but the vicar's churchwarden refused to put the motion to the meeting, and hence had arisen this suit. The subsequent proceedings taken by Mr. *Frewen* were for the purpose of asserting his legal right.

The next question is as to the right of the Plaintiffs to institute the present suit. It is submitted that this is not a case in which such a bill as this can be maintained. First, the suit is without precedent and wholly unsustainable, and if otherwise sustainable, the Plaintiffs are incompetent to maintain it, having regard to their admissions of the Defendants' title, which is *res judicata* in the proceedings that have taken place in the County Court. If

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neither of these objections prevail, the Court is not at liberty to make a decree until the legal right has been established at law; and there being two actions now pending, which have been removed by *certiorari* into the Court of Queen's Bench, this Court will not interfere, even if the matter become within its discretion. This is the first instance of an attempt to bring a case of this description into a Court of Chancery, when it can be dealt with either by an ecclesiastical Court or a Court of law.

The case of *Baker* v. *Child* (1) was a case peculiarly favourable for the exercise of the jurisdiction of this Court, since the Plaintiff had obtained a decree for an aisle in a church, and the bill was brought to quiet him in his possession, but it was dismissed. From this it would appear that if these Defendants had filed their bill to be quieted in their possession, it would have been said that this was not the Court in which to institute such a suit. On that ground alone the bill ought to be dismissed.

Again, this is a case which would at once be sent to law, were it not for Mr. *Rolt's Act* (2); but as it is a case to try the right to land, that is, the title to the chancel, it is expressly excepted out of that Act by the 4th section. But, even if Mr. and Mrs. *Frewen* now submitted to have the suit heard by this Court, it is not a case in which this Court can do so, for there is this difficulty: Mrs. *Frewen* has settled her life estate, so that she is restrained from anticipation, and she cannot bind herself from again questioning the right of the Plaintiffs to this chancel; so that she is not in a situation to contract with the Court that it shall make an order; neither can she agree to the Court deciding when it has no jurisdiction.

The next objection is, that the Plaintiffs are incompetent to maintain this suit, even if such a suit could otherwise be maintained, since they are suing on behalf of themselves and the inhabitants of the parish: *Clements* v. *Bowes* (3).

In this case both *Churton* and *Smith* are disqualified from suing, as they have admitted the Defendants' title: *Burt* v. *The British Nation Life Assurance Association* (4).

The Plaintiffs must succeed, if at all, upon the strength of their

(1) 2 Vern. 226.
(2) 25 & 26 Vict. c. 42.
(3) 1 Drew. 684.
(4) 4 De G. & J. 158.

own title, and it is not incumbent on the Defendants to shew specifically how they claim; but they will succeed if they make out their title in any one of several ways.

They can claim this chancel as their chapel in which they have the legal estate, with which the ordinary has nothing whatever to do, and in which the parishioners have no interest. They can claim it in a possessory right, which is a legal right, a perpetual right of occupation to the exclusion of all others, and in this way the freehold might be in the rector, in analogy to the case of a pew. The Defendants might also claim it as a right appurtenant either to the manor or to the manor-house, or as an independent property. Even if a pew must be claimed in respect of the inhabitancy of some house, it is not so with a chancel, which may belong to a non-parishioner: *Griffin* v. *Dighton* (1); *Clifford* v. *Wicks* (2); *Walter* v. *Gunner* (3); *Fuller* v. *Lane* (4).

With regard to the question of repair. The fact of our having repaired it is strong evidence of our right. We deny the obligation to repair as alleged by the Plaintiff; but we still admit that obligation as owners, and we say that we always have repaired this chancel.

We deny any obligation of shewing to what the right to the chancel is appurtenant; but, if it were necessary so to do, we allege that it is appurtenant to *New Place* as the manor-house, and there is nothing to prevent the right being claimed as appurtenant to the manor-house for the time being. And the Defendants having been allowed to repair it, the Plaintiffs cannot now get relief in equity. On the question of repair we refer to *Corbyn's Case* (5); *Walter* v. *Gunner* (6); *Lynwood's Provinciale* (7).

The Defendants claim it as appurtenant to land, and the argument as to pews does not apply: *Bryan* v. *Whistler* (8).

If claimed as an easement, it is not necessary to go back to the time of legal memory: *Campbell* v. *Wilson* (9).

(1) 5 B. & S. 93.
(2) 1 B. & A. 498.
(3) 1 Hag. Cons. 314.
(4) 2 Ad. Eccl. 419.
(5) 6 Rep. Fraser's Con. 342.
(6) 1 Hag. Cons. 314.
(7) (Anno 1679) p. 90.
(8) 8 B. & C. 288.
(9) 3 East, 294.

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With regard to distinction between seats in aisles and aisles themselves: *Buxton* v. *Bateman* (1).

The chapel or chancel may have been erected after the church on land not part of the churchyard, or it may have been coeval with the church on land reserved by the founder for himself. The Plaintiffs can only succeed by shewing that it was a consecrated chapel. A private chapel need not have been consecrated; or it might have been consecrated for burial, but not for prayer. The parishioners have no right to be seated, except in the nave of the church which they repair. In former days the chancels belonged entirely to the clergy, and in later times the laity had a right there only for the purposes of the holy communion and marriage. *Watson's* Clergyman's Law (2); *Gibson's* Clergyman's Law (3); *Walwyn* v. *Awberry* (4); *Frances* v. *Ley* (5); *Boothby* v. *Baily* (6).

Mr. *Sturges* appeared for the persons entitled in remainder to the manor, and asked that their rights might be reserved.

Mr. *Glasse*, in reply:—

The objection raised by the Defendants, that the bill as constituted cannot be maintained, should have been taken by demurrer, and can only affect the costs. A bill may be filed by a parishioner on behalf of himself, and all the other parishioners: *Good* v. *Blewit* (7).

This bill is properly constituted, and there is no objection to the form, and it is right to make the vicar and the ordinary parties to it: *Calvert* on Parties, "Ordinary."

There is no necessity, in such a case as this, to have the Plaintiffs' right determined by a Court of law. *Ekin* v. *Pigot* (8); *Mitford* on Pleading (9); *Story's* Equity Jurisprudence (10).

Where there is a clear case it is not requisite to send it to law; so unprecedented a claim as this the Court will not send to law: *Lloyd* v. *Jones* (11).

It is said that this case is within the 4th section of the Act

(1) 1 Sid. 88, 201; S. C. Keb. 370.
(2) Page 388.
(3) Page 645.
(4) 2 Mod. 254.
(5) Cro. Jac. 366.
(6) Hob. 69.
(7) 13 Ves. 399.
(8) 3 Atk. 297.
(9) 4th ed. p. 146, 147.
(10) Vol. ii. p. 148.
(11) 6 C. B. 81, 89.

25 & 26 Vict. c. 42; but we have a right to come to this Court to restrain the violent acts of the Defendants: *Egmont* v. *Darell* (1).

The right to the freehold only arises incidentally, and there is nothing to prevent this Court from deciding the case, nor would it have been necessary to send it to law under the old practice: *Mayor of York* v. *Pilkington* (2); *Ewelme Hospital* v. *Andover* (3); *Weale* v. *The West Middlesex Waterworks* (4).

The present form of suit avoids the necessity of a multiplicity of suits and actions, and the question can now be determined finally in the presence of all the parties interested.

The Defendants have submitted to the jurisdiction, and the Court will treat the answer of Mrs. *Frewen* as binding upon her, since the property is settled to her separate use: *Callow* v. *Howle* (5); *Clive* v. *Carew* (6).

The vicar has no power in his corporate capacity to make any admission of the Defendants' right. He could not bind the inheritance of the church.

The remainder-man in this case is a necessary party: *Poore* v. *Clark* (7).

Upon the merits of the case it is submitted, that if this chapel was annexed to the church, it must have been endowed, otherwise the bishop would not have consecrated it; and if endowed, it must have been forfeited to the Crown by the Act 1 Edw. 6, c. 14: *Bloxam's* Church Architecture (8); *Burn's* Eccl. Law "Church, Consecration of" (9). The only right the Defendants can have is an easement, and the measure and extent of the right is the user. No layman, unless he be the lay impropriator, can be entitled to any part of the freehold of the church, though he may have an easement: *Burn's* Eccl. Law (10). He could only have a right to have prayers said for the souls in purgatory, and he might have a right to sit and to be buried there: *Coke's* Inst. (11). If it cannot be a freehold, but must be an easement, then the easement is shewn

(1) 1 H. & M. 563.
(2) 1 Atk. 282.
(3) 1 Vern. 265.
(4) 1 J. & W. 369.
(5) 1 De G. & Sm. 531, 533.
(6) 1 J. & H. 199.
(7) 2 Atk. 515.
(8) Page 421.
(9) Vol. i. p. 323.
(10) Page 343.
(11) Vol. i. pp. 121 *b*, 122 *a*.

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by user, and that must be shewn as continuous user: *Lousley* v. *Hayward* (1); *Stephens's* Laws of the Clergy (2).

The easement is lost if the user ceases: *Fuller* v. *Lane* (3); and *Byerley* v. *Windus* (4); shew that extra-parochial persons cannot establish a claim to seats.

It has been contended that repair is the foundation of the Defendants' title; but it is submitted that user is the foundation of a title by prescription, and repair is only evidence to a certain extent. There may be an obligation to repair by custom, without a corresponding benefit: *Burn's* Eccl. Law, "Church" (5).

That the Defendants can have no freehold, is shewn by *Spooner* v. *Brewster* (6); *Comyn's* Digest, "Cemetery;" *Buxton* v. *Bateman* (7).

There is no difference between aisles and pews: *Mainwaring* v. *Giles* (8); *Coke's* Inst. (9); *Buxton* v. *Bateman* (10). A man may have an easement for priests to say prayers in the aisle. Even if a person had a freehold in any part of the church, he could only have a right to enter during divine service. There is no case in which an action would lie in trespass for prescriptive right to part of the fabric. The remedy is case, not trespass, therefore the right is easement: *Shambrok* v. *Fettiplace* (11); *Spooner* v. *Brewster* (12).

In this case there has been no user made out except the erection of a monument and a hatchment: *Walter* v. *Gunner* (13). The lords and ladies of the manor have never been used to sit in this chancel, therefore there has been no user. It was used only for the ladders and the parish chest until the Plaintiffs placed benches there in 1857.

Then as to repairs, there is no evidence of any repairs being done before 1798. The presentments between 1716 and 1721 only shew that repairs were wanted, but that is not proof of their having been done. If the Defendants have a prescriptive right,

(1) 1 Y. & J. 583.
(2) Pages 907, 908.
(3) 2 Addams, 419.
(4) 5 B. & C. 1.
(5) Page 346.
(6) 3 Bing. 136.
(7) Sir T. Raym. 52.
(8) 5 B. & A. 356.
(9) Vol. i. p. 121 *b*, 122 *a*.
(10) 1 Keb. 370.
(11) 2 Mod. 283.
(12) 3 Bing. 136.
(13) 1 Con. Rep. 314.]

still they are not justified in interfering with the ordinary, whose jurisdiction extends to the chancel as well as the church: *Griffin* v. *Dighton* (1).

There is nothing to support the Defendants' claim, which is in derogation of all common right.

July 7. SIR R. T. KINDERSLEY, V.C.:—

[Having proceeded to consider the affidavits, came to the conclusion, on the architectural evidence, that the chapel was an ancient chapel, physically and materially attached to the church; and that when the church was founded, there was, about the same time, probably simultaneously, erected by the founder of the church (whoever that was) a chapel, but divided from the church by a parclose; that it was against all probability to suppose that a public chapel would be erected adjoining a small country church, and therefore he was of opinion that it was a private, and not a public chapel; that there was evidence which satisfied him that the chapel in question was the private chapel of the lords of the manor of *Icklesham*, and appendant or appurtenant to the manor or manor-house. His Honour then referred to *Blackstone's* Commentaries (2); *Godolphin's Repertorium* (3); *Nelson's* Laws of the Clergy (4); and *Johnson's* Clergyman's *Vade Mecum* (5); as shewing that in ancient times the founders of churches were very generally lords of manors; and that it was the custom in early times for the lord of a manor, when founding a church, to found with it a private chapel, not annexed to his house, but to the church itself, considering perhaps, that it derived some additional sanctity from being, as it were, made part of the church in appearance, and close to the church; and it was a common practice for lords of manors, and other men of note in the country, to obtain leave either from the Pope, or from the Crown, or from the patron, the ordinary, and the incumbent (and the lord of the manor would generally be the patron), to annex a chapel to an

(1) 5 B. & S. 106.
(2) Vol. ii. p. 27.
(3) Page 145.
(4) Page 166.
(5) Page 19.

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existing church; that this was most commonly done in the thirteenth and fourteenth centuries, and in that manner a number of chapels were annexed to churches, such chapels being founded for the purposes of private masses and prayer, and as places of sepulture for the families of the founders. That it might be inferred, as a strong probability, that the founder of *Icklesham Church* was the lord of the manor, and it appeared from the documentary evidence that in the time of *Henry* III., namely, between 1216 and 1272, the lord of the manor of *Icklesham* was the patron of the church, and the advowson became appendant to, and until severed, always passed with the manor. The documentary evidence was corroborative of what it seemed to his Honour would be concluded from the general practice, that the church was founded by the lords of the manor of *Icklesham;* and if it were the fact that this chapel was either actually coeval with the church, or was built shortly afterwards, there could be no question but that the chapel was built by the lords of the manor, who were the patrons because they were the founders of the church. The documentary evidence further shewed that the lords of the manor of *Icklesham* were, from a very early period, certainly from 1478, a family of the name of *Fynche;* in that year one *Henry Fynche,* by his will, directed his body to be buried in the chapel; and in 1592, proceedings were taken by the bishop against Sir *Moyle Fynche* for not repairing the chapel; and the documentary evidence shewed that the *Fynche* family, which had become the *Winchelsea* family, continued lords of the manor down to a very recent period; that there was a *primâ facie* evidence of title to the chapel in such lords of the manor; and that Mr. and Mrs. *Frewen* had shewn their derivative title to the manor. His Honour then continued:—]

We come now to the very important question, by whom has this chapel been from time to time repaired? The Plaintiffs state in their bill that the southern part of the chancel (being the chapel in question) is alleged by the Defendants to have been from time immemorial repaired by the lord or lady of the manor of *Icklesham* for the time being; and the Plaintiffs charge that whenever any such repairs were done by such lord or lady, the

same were done in discharge of an obligation imposed on the manor of *Icklesham*, or the demesne lands thereof, or some part thereof, or upon some lands or hereditaments which then were, and had always or generally been, held by the person for the time being the lord or lady of the manor; but that the Plaintiffs have not been able to discover upon which hereditaments in particular such obligation was imposed. The Plaintiffs also charge that such obligation was not accompanied by any right or privilege in regard to the southern chancel; and that neither the lord nor lady for the time being of the manor, nor the owner or occupier of the houses called respectively *New Place* and *Old Place*, had any such right or privilege, or had ever been accustomed to sit in the southern part of the chancel, or been accustomed to use, or ever used the same, as a place of burial, or for the purpose of hearing divine service, or in any other way. The Defendants, Mr. and Mrs. *Frewen* in their answer say, that the chapel in question has been from time immemorial repaired by the lords of the manor of *Icklesham* for the time being, or by the owners for the time being of the manor-house of the said manor; but they deny that any obligation to do such repairs is imposed upon the manor of *Icklesham*, or the demesne lands thereof, or any part thereof, or upon any lands or hereditaments which then were, or had always, or generally, or at any time, been held by the lord or lady for the time being of the manor. So that the Plaintiffs do not raise the issue of fact, whether the chapel has been always repaired by the lord or lady of the manor; but assuming the fact to be so, they attribute it to some special obligation attaching upon some particular portion of property which they are unable to specify; and at all events there is not a suggestion that any repairs have ever been done to the south chancel (*i.e.* the chapel in question) by the parish, or by the rector, or by any person or persons other than the lord or lady of the manor of *Icklesham*. Moreover, the documentary evidence shews that some two hundred and fifty years ago, and subsequently by certain judicial proceedings duly had in the proper ecclesiastical Courts, and otherwise, the lord or lady of the manor was repeatedly treated and dealt with as the person liable to repair this chapel; and it appears that within the time of living memory the repairs have always been done by the

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lord or lady of the manor down to the year 1856. It appears indeed that the chapel has been cleaned and swept out by the parish; but that cannot be regarded as repairing it.

Another question is with regard to user of this chapel. We know that the original purpose for which such chapels as this were erected, was not to enable the owners to attend divine service when high mass was celebrated in the church before the whole congregation; but they were intended partly for the purpose of private masses, and other offices and rites of the Roman Catholic Church, for the repose of the souls of deceased persons (as to which it will be recollected that in the twelfth and thirteenth centuries the doctrine of purgatory became most fully developed); and partly as places of sepulture for the owners and their families. The evidence shews that this chapel was used for both those purposes; the existence of the piscina and sedile clearly proves the former existence of an altar in this chapel; and though there is only one monument (that of *Arnold Nesbitt*, lord of the manor, who died in 1779), it cannot be doubted that in early times many persons were buried in the chapel; while the absence of burials there in later times is accounted for by the fact that the lords of the manor of *Icklesham* have for the most part been resident away from the parish. It is proved, however, that the Defendant, Mrs. *Frewen*, as the widow of Mr. *Musgrave Brisco*, the late lord of the manor, put up a hatchment on his death, in this chapel without the leave of the bishop or incumbent, or any other person being obtained, and without paying any fees. There has been no sitting in the chancel by the lord or lady of the manor during divine service; but it appears that they have been resident out of the parish for a considerable period.

The Plaintiffs however allege user by the parish, the congregation having sat in it during divine service from 1848 to 1853. It appears that during that time the church underwent considerable repairs, and while these were going on it was convenient that the congregation should sit in this chancel. But that amounts to no user as indication of right, and it does not appear whether the lord or lady of the manor was aware of it; and moreover the seats then used were merely temporary moveable seats, and not fixed seats as in the body of the church. It is also said that

vestry meetings and the sunday school have at different times been held in it; but I do not think that this proves anything in derogation of the right of the lord of the manor.

With regard to the reputation in the neighbourhood, the evidence shews that this has always been called the manor chancel, and regarded as the sole and exclusive property of the lord of the manor.

Upon the evidence therefore, it appears to me that, consistently with the common law of the country, consistently with ecclesiastical law, consistently with ancient usage, it is well established that this is an ancient chapel, which originally belonged to and still belongs to the lords of the manor of *Icklesham;* that they have the exclusive right to it, and that the parish has no right whatever, except by permission of the lord of the manor, to make use of this chapel. The fact of the repairs having been always done by the lords of the manor, is that which gives the greatest force to their title.

It is contended by the Plaintiffs, however, that if this is an ancient chapel it must be assumed to have been an endowed chapel, because, if not endowed, the bishop would not have consecrated it; and that if endowed (being a chantry chapel), it was forfeited to the Crown by the Act 1 Edw. 6, c. 14. But I think it cannot be maintained, as a matter of positive assumption, that the bishop in the twelfth or thirteenth century would, when consecrating the church, refuse to consecrate a chapel attached to the church unless it were endowed. But there is evidence, from the piscina and sedile, that this was a consecrated chapel; and in the reign of Queen *Elizabeth* the chapel was recognised as being the property of the lords of the manor, which would not have been the case if it had been forfeited to the Crown under the Act of *Edward* VI.

The Plaintiffs' Counsel have much relied on an admission contained in the Defendants' answer, that the freehold in this south chancel, like the rest of the church, is in the rectors, who are the Ecclesiastical Commissioners for *England,* and they insist that, if that be so, all that the lord of the manor has, is an easement, or the same sort of right as a man has to a pew in a church, which right depends upon inhabitancy, and is ordinarily annexed to the

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habitation of some house in the parish; and that, if so, the lords of the manor of *Icklesham* have lost that easement. The Defendants contend that the admission was by mistake; and in fact they applied by motion for leave to file a supplemental answer to correct it. This application I refused, because there was then no evidence before the Court to justify the conclusion that the admission was not quite correct in fact. There is now sufficient evidence to shew that there was no foundation for the admission; and if the admission was made in error, I think the Defendants ought to be allowed to explain it; and they have since filed an affidavit for that purpose.

2 P D 23

But supposing the freehold to be in the Ecclesiastical Commissioners as rectors, does that necessarily destroy the rights of the lords of the manor to the exclusive use of it as a chapel or as a place of burial? It appears to me, having gone through the authorities, that they lead to no such conclusion; but that the lords of the manor would still be entitled to the exclusive use of it. If this chapel is coeval with the church, as I have come to the conclusion that it is, what supposition is more probable than that the lord of the manor, in founding the church, and dedicating it "to God and the Church," reserved a perpetual right to the exclusive possession and enjoyment of this as his chapel. That alone would be sufficient to justify the prescription. But we find from the authorities that a man may prescribe for a chancel, or for an aisle, or for a pew in an aisle, or even in the nave of the church, if he prescribes for that, he and those whose estate he has have always had it, and have always repaired it, even though the estate or house in question be out of the parish. In the case of *Boothly* v. *Baily* (1) this is distinctly laid down; and it was held that the prescription in that case was bad because it was not founded on the fact of having always repaired the pew. The same proposition is laid down in *Godolphin's Repertorium* (2); *Johnson's* Clergymen's *Vade Mecum* (3); by Lord Chief Baron *Macdonald* in *Lousley* v. *Hayward* (4); in *Buxton* v. *Bateman* (5); *Corven's Case* (6); and *Digge's* Parsons' Counsellor (7).

(1) Hobart's Rep. 69.
(2) Pages 137, 150.
(3) Page 19.
(4) 1 Y. & J. 583.
(5) Sid. 88.
(6) 12 Rep. 105.
(7) Page 213.

[The VICE-CHANCELLOR having read the passages referred to, continued:—]

I think it is unnecessary to cite further cases for the purpose of shewing that a claim by prescription to the exclusive use and enjoyment of this chapel by the lord of the manor will be supported, if the claimant can suggest a reasonable intendment as to the probable origin of such right, and if the use and enjoyment (so far as the evidence extends) has been in accordance with such alleged right, and the repairs have always been done by the lord of the manor. And these requisites for the validity of the claim by prescription in the present case are, in my opinion, sufficiently established by the evidence. Therefore it appears to me that the admission in the answer, as to the freehold being in the rector, is not necessarily fatal to the case of Mr. and Mrs. *Frewen*, even if such admission is to be held binding upon them.

Some question has been raised as to whether the house called *New Place* is the manor-house; and some of the witnesses say that they believe that this *New Place* was built about 200 years ago, and they speak of a tree which appears (as they say) about 200 years old, and which is said to have been planted about the time when that house was built. It is also suggested that there was once a house called *Old Place*, which occupied the spot which is now a hop-garden, and that *Old Place* was the manor-house. But it appears that *New Place* is the place where, as far as we can trace, the manor courts have always been held, and the business of the manor conducted. It has not indeed for a considerable time, it may be for generations, been occupied by the lords of the manor; but it has been their property. It is not necessary for me to say that I should conclude, as a matter of absolute certainty, that *New Place* is the original manor-house; but I must say I think, as far as the evidence goes, there is strong reason to believe that the house which existed on the site on which the *New Place* was built (perhaps some 200 years ago) was the original manor-house. Therefore, if it was necessary that this right should be attached to a house, there is, I think, sufficient ground for assuming that it was attached to that manor-house, and if necessary, that manor-house would support the prescription. I conceive the prescription

V.-C. K. 1866 CHURTON v. FREWEN.

is well supported (assuming the freehold to be, not in the lord, but in the rector) to the exclusive right to the use and enjoyment of the chapel by the lord of the manor.

Under these circumstances I must dismiss the bill, which, it appears to me, cannot be supported; and I must dismiss it with costs. The Ecclesiastical Commissioners, who have supported the Plaintiffs' contention, will not have their costs.

Solicitors for the Plaintiffs: Messrs. *Senior & Attree.*

Solicitors for the Defendants: Messrs. *Langham & Son;* Messrs. *White, Borrett, & White;* Messrs. *Young, Jones, Roberts, & Hale.*

PRIOLEAU *v.* UNITED STATES, AND ANDREW JOHNSON.

V.-C. W.
1866
July 5, 6.

Jurisdiction—Corporate Plaintiff—Foreign State—Discovery, Parties for—Cross Bill—Pleading—Demurrer.

The *United States of America* suing in the courts of this country, and thereby submitting themselves to the jurisdiction, stand in the same position as a foreign sovereign, and can only obtain relief subject to the control of the Court in which they sue, and pursuant to its rules of practice; according to which every person sued in this Court, whether by an individual, by a foreign sovereign, or by a corporate body, is entitled to discovery upon oath touching the matters upon which he is sued, and to file a cross bill for the purpose of obtaining such discovery.

Proceedings were accordingly stayed in a suit by the *United States of America*, suing in their corporate capacity, until an answer should have been put in to the cross bill of the Defendant. But *Held*, that the President of the *United States* had been improperly made a Defendant to the cross bill, as the person to give discovery.

Semble, that a demurrer should have been filed to a bill by the *United States*, where no public officer was put forward as representing their interests who could be called upon to give discovery upon a cross bill.

THIS was a cross bill to a suit of *United States* v. *Prioleau*. A motion was now made, on behalf of the Plaintiffs in the cross suit, that the time for closing the evidence in the original suit might be enlarged until one month after the Defendants in the cross suit should have put in their answers to the bill filed against them by the Plaintiffs in the same cause, and that either forthwith, or if not forthwith, in case of such answers not being filed within one month from the date of the order to be made on this application, at the expiration of one month, or at such other time, and upon the said *Charles Kuhn Prioleau* complying with such other conditions as the Court should specify, the said *C. K. Prioleau*, the receiver appointed by an order made in the first-mentioned cause, on the 26th of July, 1865, might be discharged, the Defendants, *Wagner*, *Welsman* and *Trenholm*, waiving any account from such receiver; and that thereupon the recognizance entered into by *Prioleau* on the 14th of August, 1865, together with his sureties, might be vacated.

The original suit was instituted by the *United States of America*,

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suing in their corporate capacity, for the purpose of establishing their right to certain bales of cotton shipped at *Galveston*, in the state of *Texas*, during the Secession war, and consigned for sale in this country, for the benefit of the *de facto* Confederate Government, to the Defendants *Prioleau* and others, who carry on business at *Liverpool* under the firm of *Fraser, Trenholm, & Co.* In July, 1865, the *United States*, as Plaintiffs, moved for an injunction to restrain the Defendants, *Prioleau* and others, from obtaining possession of the cotton from the *Mersey Docks and Harbour Board*, in whose custody it then was, and from dealing with it otherwise than under the direction of the Plaintiffs, who claimed it as State property to which they had succeeded on the dissolution of what was termed in the bill "the pretended or so-called Confederate Government." After a very elaborate argument (see *The United States* v. *Prioleau* (1)), the Vice-Chancellor, on the 26th of July, 1865, made an order appointing Mr. *Prioleau* receiver of the cotton upon his giving security in the sum of £20,000. In November, the Defendants (*Prioleau* and others) put in their answer. The bill was amended, and on the 28th of February, 1866, Messrs. *Prioleau* filed this cross bill against the *United States of America* and President *Andrew Johnson*, for the purpose of obtaining discovery in reference to the matters in question in the suit, alleging that it was "necessary that Plaintiffs should obtain from the Defendants, discovery in reference to the above-mentioned statements contained in the answer of Plaintiffs, and also in reference to other statements herein contained. The facts and circumstances as to which the Plaintiffs require discovery are within the knowledge of the Defendant *Andrew Johnson*, who is the President of the *United States*, and the Plaintiffs can only have full discovery by making him a Defendant to this suit, with a view to his answering the interrogatories intended to be filed." An order was made for substituted services of the cross bill, and interrogatories for the examination of President *Johnson*, upon the solicitors conducting the suit of the *United States* in this country. No answer having been put in by President *Johnson*, the Plaintiffs in the cross suit now moved that the time for closing the evidence in the first suit might be enlarged until one month after the

(1) 2 H. & M. 559.

Defendants to the cross bill should have put in their answer, and that, failing such answer, the receivership of *Prioleau* might be discharged and his recognizances vacated.

Mr. *Rolt*, Q.C., Mr. *W. M. James*, Q.C., and Mr. *Charles Hall*, appeared in support of the motion.

Upon the motion being opened, the *Attorney-General* (Sir *R. Palmer*), with whom were Mr. *G. M. Giffard*, Q.C., and Mr. *Druce*; stated that, on behalf of the *United States*, he did not oppose the motion so far as it was directed against the Plaintiffs in the first suit, but that he should resist the motion as against the President, who was not a party to the first suit, and had been improperly made a Defendant for the purposes of discovery.

Mr. *Rolt*, Q.C., Mr. *W. M. James*, Q.C., and Mr. *Charles Hall*, in support of the motion:—

1. It is the right of a Defendant, who is being sued in this Court, to file a cross bill for the purpose of obtaining discovery in aid of his defence, and the Plaintiff in the original suit cannot go on seeking relief without putting in an answer to the cross bill. 2. In the case of a suit by a corporation, the Defendant filing a cross bill is entitled to make some officer of the corporation a Defendant, for the purpose of giving that discovery which is not obtainable from the corporation itself upon oath: *Glasscott* v. *The Copper Miners Company* (1); *Wych* v. *Meal* (2); *Anon.* (3). A sovereign ruler or state who submits himself to the jurisdiction of this Court for the purpose of obtaining relief, is in the same position as any other Plaintiff with respect to being bound by the procedure and practice of the Court: *The King of Spain* v. *Hullet* (4); *Duke of Brunswick* v. *King of Hanover* (5). The *United States*, in resorting to the tribunals of this country in their corporate capacity, stand in the same position as a corporation, and as the "body politic" of the *United States* has no individual entity that can give discovery upon oath, the Defendant is entitled by analogy to select the President as the highest officer of the state, and compel discovery from him. The object of the Defendant *Prioleau* is to obtain

(1) 11 Sim. 305. (2) 3 P. Wms. 311. (3) 1 Vern. 117.
(4) 1 Cl. & F. 333. (5) 6 Beav. 1.

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discovery before the suit proceeds any further towards a hearing, and the motion does not seek to discharge the receiver until after an interval, so as to provide for the event of the bill not being answered. If the *United States* object that the President has been improperly made a Defendant, it is incumbent upon them to point out some person who can and will give this discovery: *The Nabob of Arcot* v. *East India Company* (1). Are the authority and position of the *United States* Government to be regarded rather than the rules and regulations of this Court? The tribunals of this country are open no doubt to foreign sovereigns and bodies politic, but they must obey the rules of those tribunals, be bound by their procedure, and sue in such a form as makes it possible that complete justice may be done between the parties: *The Columbian Government* v. *Rothschild* (2).

The *Attorney-General* (Sir *R. Palmer*), Mr. *G. M. Giffard*, Q.C., and Mr. *Druce*, for the Defendants:—

No analogy exists between a corporation and the Government of the *United States*, which is in no way subject to the jurisdiction of this Court. It is the well-settled rule of the Court that a bill of discovery cannot be maintained against a person who is not a Plaintiff in the original suit, or whose name is not on the record of the action at law, and the exception to this rule in the case of proceedings by a corporation, where a species of vicarious discovery is allowed, is an anomaly incapable of extension. As well might all the ministers of the Crown be made parties to a cross bill where the original proceedings are taken on behalf of the Crown by the Attorney-General, from whom discovery upon oath cannot be obtained. So again in the case of a suit by a foreign sovereign state, every member of the Government might, upon the theory advanced on the other side, be made a party and compelled to reveal important state secrets as the price of the right to bring the original suit to a hearing. Any such rule would be opposed to the plainest principles of international comity, would occasion monstrous inconvenience, and would result in a practical denial of justice. At all events the President has been improperly made a Defendant, and in order

(1) 3 Bro. C. C. 291. (2) 1 Sim. 94.

to obtain the required discovery some officer of state should have been selected who is under the control of the sovereign state, and whose oath could bind it. Upon these grounds the application must be refused: *The Queen of Portugal* v. *Glynn* (1); *Daniell's* Chancery Practice (2).

Mr. *Rolt*, replied.

In the course of the reply his Honour suggested that the better course might have been to move to stay proceedings in the first suit until an answer had been put in to the cross bill.

Mr. *Rolt*:—That would have thrown upon Mr. *Prioleau* the burden of selecting the proper person to give the discovery. If the *United States* were the only Defendants upon the record, then any motion of this nature would have been resisted, upon the technical ground that there was no Defendant before the Court who could make answer upon oath.

July 6. SIR W. PAGE WOOD, V.C.:—

The question in this case is one in some degree novel, but the general principles applicable to it are sufficiently established. The only difficulty in the present case is the particular mode selected by the Plaintiffs in the cross suit for arriving at the object they have in view. A bill being filed by the *United States of America*, under that description, against the Defendants, a cross bill is filed by the Defendants for the purpose of obtaining discovery. They cannot of course, obtain discovery upon oath from a body which is corporate—it is difficult to know how to express its position. It is not a corporation, strictly speaking, but it is a body so far corporate as not to present to the Court as a suitor any one individual. Where the suitor is an individual, although he may be the sovereign of a foreign country, and may of himself in reality represent the whole country of which he is sovereign, this Court has refused to acknowledge him when he comes here as a suitor in any other capacity than as a private individual. It has been determined by the highest authority that he must conform to the prac-

(1) 7 Cl. & F. 466. (2) 2nd ed. 143, &c.

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tice and regulations for administration of justice of the tribunals to which he resorts for relief; and, among other things, as was determined in *The King of Spain* v. *Hullett* (1), he is obliged to answer upon oath. It is also established, beginning with the anonymous case in *Vernon*, and finally settled by *Wych* v. *Meal* (2), that all persons sued in this country as a body corporate are amenable to the process of the Court, and must answer by one or other of their officers upon oath, inasmuch as it is considered essential to justice that answers shall be made upon oath. I say essential to the interests of justice, because I believe the only exception to this is in the case of the Attorney-General, where I apprehend it arises from the dignity of the Crown, to which the Court is obliged to have regard, and, accordingly, officers of the Crown in this country are not put to make discovery upon oath. This very exception was attempted to be introduced in the case where the *King of Spain* was Plaintiff, but without success.

With reference to the foreign sovereign, it was endeavoured to be maintained that he ought not to be treated as a common suitor, and made to answer upon oath, but it was held that no such privilege existed in the sovereign of a foreign country. As regards the Attorney-General, no instance has been cited where the Attorney-General has been obliged to answer upon oath. Mr. *James* referred me to the case of *Attorney-General* v. *Brooksbank* (3), but there the officers of the Crown were not put upon their oath, but were prevented from proceeding in the information until certain documents had been produced (not upon oath) from one of the public offices. That was the case of an information by the Attorney-General against an army agent for a discovery of accounts. The army agent pleaded a settled account, and his plea having been overruled he moved for leave to amend the plea, and for the purpose of so doing, that the Attorney-General might be ordered to produce certain vouchers and accounts rendered by Defendant annually to the War Office, which he swore were material to his defence. The learned Judge, *Alexander*, C.B., who was well acquainted with the practice of Chancery, having been long a Master of this Court, said:—"It is usual when a Defendant is desirous of obtaining the production of documents in the possession

(1) 1 Cl. & F. 333. (2) 3 P. Wms. 310. (3) 1 Y. & J. 439.

of the Plaintiff, to file a cross bill for that purpose; which probably in this case would be attended with no beneficial effect, as the documents are not pretended to be in the custody of Her Majesty's Attorney-General. The case of *The Princess of Wales* v. *The Earl of Liverpool* (1), however, is an authority for deviating under particular circumstances from established practice, and I think the affidavit of the Defendant lays sufficient ground in this case for adopting the course which was there pursued. I am of opinion that the proceedings on the information should be stayed until the documents sought by the motion are produced." And the other Judges concurred. The case is important, as shewing that the Court is in no way fettered in its course of proceeding, but where justice requires it will take care that those who are engaged in litigation shall have full and fair information upon the subject-matter of the litigation, and adopts that mode which shall be the most efficient for the purpose. What, then, is to be done in the case of a bill filed by a political body, such as the *United States* (not a physical but a metaphysical entity), proceeding as a sovereign state, and endeavouring to assert its rights in this country? Is there any reason why the Defendant in the original suit should be deprived of those privileges which are enjoyed by every other party to a suit, or why either he or the government suing here should not be dealt with according to the rules by which all other individuals, including the sovereign of any other state, must be dealt with when they seek to obtain relief in this Court? It appears to me there is no sound ground for saying that the rule is not to be applied. There may be difficulties in this case in selecting the person who is to make the answer; but there is no sound ground for contending that the Plaintiff in the cross suit is not entitled to have full and adequate discovery, and upon oath if necessary, from some one or other.

The case of *The Columbian Government* v. *Rothschild* (2), seems to have determined that there was one mode of procedure, which has never been followed so far as I am aware—probably the case has never arisen in the same way—viz., that parties sued by a foreign government of this description not represented by a single head may, if they think fit, demur to the bill.

(1) 1 Swan. 114, 580; 3 Swan. 567. (2) 1 Sim. 94.

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Sir *J. Leach* said: "A foreign state is as well entitled as any individual to the assertion of its rights, but it must sue in a form which makes it possible for this Court to do justice to the Defendant. It must sue in the names of some public officers who are entitled to represent the interests of the state, and upon whom process can be served on the part of the Defendants; and who can be called upon to answer the cross bill of the Defendants," and he allowed a demurrer to a bill filed under the general description of "*The Columbian Government.*"

It is quite true that in that case the demurrer did not turn merely upon the persons suing being described as the *Columbian Government*; but questions were raised whether it was a government that could be recognised. If it was not a government with which any treaty or authorized communication had been had, so that this Court could take judicial notice of the existence of the government, that would, it was contended, be a sufficient ground for a demurrer. It was also said that a bill could not be filed by a body described as a government without putting forward some substantial agent, against whom relief could be had by a cross bill if necessary. Here there has been no demurrer. The Defendants have answered the original bill, and filed a cross bill in which they have joined the President as a Defendant with the *United States of America.*

Now it is quite impossible, on any principle of analogy, to say that the President has been properly selected, or that he is the person for whose answer upon oath the *United States* must wait before they proceed in their original suit. One sees how the matter arose in the cases as to corporations. In the *Anonymous Case* (1), it arose from the gross misconduct on the part of the Defendants, a corporation, who put in an answer on oath, about 1682, taking care not to answer anything which could be to their detriment, and thereupon the Court said that the Plaintiff might make any person who was a member of the corporation a Defendant to answer that bill, and that perhaps has been the origin of the singular practice of allowing the Plaintiff to select any person and make him a Defendant for the purpose of having discovery. *Dummer* v. *The Corporation of Chippenham* (2), was the case of a

(1) 1 Vern. 117. (2) 14 Ves. 245.

demurrer by several members of a corporation accused of breaches of trust, and they demurred on the ground that the corporation ought to have been the sole Defendant. Lord *Eldon* said:—"The question upon this case is whether this Court can entertain a bill against these individuals as parties to obtain a discovery, whether through their means, so manifested, there was such an abuse of the discretion, vested in the corporation, as trustees, as this Court will reform. Upon the whole, my opinion is, that this is a case in which the Court will call upon individuals under such circumstances for an answer. The first case cited from *Vernon*, though very strong, does not in its language go farther than the principle of the case determined by Lord *Talbot* (*Wych* v. *Meal*) would extend. What particular circumstances would authorize the Court to order that, besides the clerk of the company, such principal members as the Plaintiff should think fit, should answer upon oath, I cannot discover: but I can fancy the principle. Suppose an individual corporator, whose estate was charged with a rent or payment to a charitable use, of which the corporation had the management, had obtained possession of the deed, and had destroyed or cancelled it: upon an information in this Court for the purpose of having the estate of the charity properly administered by the corporation who are trustees, it would be perfectly competent to call upon the mayor, if he was the individual implicated in that conduct, not only to answer with the rest under their common seal, but also to answer as to the circumstances relative to that deed, supposed to be in his hands. The reason of making the clerk or officer a party is, that generally he is the person who can give the information."

In a case before Sir *Lloyd Kenyon*, M.R., *Moodalay* v. *Morton* (1), which was a bill against the *East India Company* (as in *Wych* v. *Meal*) and their secretary, the secretary was advised to object to general discovery, and the point was raised, though not determined, whether a distinction could be drawn between acts incident to the character of the *East India Company* as a sovereign power, and in exercise of their dominion as such, and between their acts as a private company. The Master of the Rolls (Sir *Lloyd Kenyon*) said: "At the outset I thought the cases of a corporation and of an individual were different, but I am glad to

(1) 1 Bro. C. C. 469.

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have the authority of Lord *Talbot* that they are not. . . . I admit that no suit will lie in this Court against a sovereign power for anything done in that capacity; but I do not think the *East India Company* is within that rule. They have rights as a sovereign power, they have also duties as individuals; if they enter into bonds in *India* the sums secured may be recovered here. So in this case, as a private company, they have entered into a private contract to which they must be liable."

I mention that to shew that the point was there raised, but did not call for decision, and I do not know that the exact point has ever been decided of a sovereign state suing without any individual being put forward to represent it. The objection of the Attorney-General, that this body corporate, or whatever you please to call it, is not subject to the jurisdiction of this Court, is not sound. Undoubtedly, if a foreign corporation (not a foreign state) sues in this country, as was the case in *The Collins Company* v. *Brown* (1) the Court will exercise its ordinary jurisdiction by compelling the secretary of the company to put in his answer upon oath to a cross bill. Having submitted themselves to the jurisdiction of the Court, the Court will not allow a single step to be taken after a cross bill has been filed until full discovery is given by them.

But my difficulty here has been of a totally different character. Although it may be true that in the *Anon. Case* (2), and in *Dummer* v. *Corporation of Chippenham* (3), the officer whom you choose is selected from a body corporate, it is upon this ground that the body corporate is suing, and that the person selected is an officer or agent of the body corporate, a person under their control; and inasmuch as the body corporate must sue through the medium of people, flesh and blood, and through agents through whom communications must pass: in order that the suit of the body corporate may proceed, the Court says that from those agents the information shall be derived. This, I apprehend, was Sir *J. Leach's* view in *The Columbian Government* v. *Rothschild* (4).]

Now the selection of the President of the *United States* is open at once to this objection, that the Court cannot take judicial notice —nor do I suppose it is a matter of fact—that the *United States'*

(1) 3 K. & J. 423.
(2) 1 Vern. 117.
(3) 14 Ves. 245.
(4) 1 Sim. 94.

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Government have control over their President or can compel him to produce papers or the like, and therefore I cannot make any order that the proceedings in the original suit be stayed until the President has put in his answer. No doubt ways and means are to be found for getting the discovery sought. It is not for me to point them out, nor do I at present give any opinion whether these Plaintiffs have forfeited their right by not demurring to the bill. It is enough to say that I by no means see any failure of justice by refusing to stay proceedings until the President has answered; and in saying this I do not in the least hold out the notion that because a State is not represented by an individual that therefore such State can be in a better position than a monarchy, or can sue in this Court without doing that justice through the means of discovery, which this Court insists shall be given by persons in the position of suitors, against whom a cross bill may be filed. I can do no more than make an order staying proceedings until the answer of the *United States* is put in, and the costs must be costs in the cause.

Solicitors: Messrs. *Gregory, Rowcliffes, & Co.*; Messrs. *Sharpe & Parker.*

In re GIBSON.
MATHEWS *v.* FOULSHAM.

V.-C. W.
1866
May 23.

Will—Specific Legacy—Ademption—Wills Act, s. 24—*Contrary Intention.*

Testator being at the time possessed of £1000 guaranteed stock in the *N. B. Railway*, bequeathed to *A.* "my one thousand *N. B. Railway* preference shares." After his will he sold his *N. B.* guaranteed stock, and died possessed of shares and stock in the *N. B. Railway*, acquired by several successive purchases, exceeding the amount bequeathed to *A.*:—

Held, that the bequest, being of a specific thing, which had been adeemed, and was not in the testator's possession at the time of his death, a "contrary intention," so as to exclude the operation of 1 Vict. c. 26, s. 24, sufficiently appeared upon the will, and that *A.* was not entitled to have his legacy satisfied out of the *N. B. Railway* shares and stock in the testator's possession a the time of his death.

JOHN GIBSON, by his will, dated the 17th of June, 1856, gave and bequeathed the residue of his estate and effects, both real and

V.-C. W. 1866 *In re* GIBSON. MATHEWS *v.* FOULSHAM.

personal, unto his executors and trustees, to hold the same upon the trusts thereinafter mentioned: viz., upon trust to allow his widow to receive the interest and dividends payable on his 200 shares in the *Monarch Life Assurance Society* during her life, with a gift of the shares after her death to testator's granddaughter for her own use and benefit, "and upon further trust to assign, transfer, and deliver unto my son *Joseph*, now residing in *Upper Canada*, my one thousand *North British Railway* preference shares, for his own use and benefit."

By a codicil, dated the 18th of April, 1860, after reciting the death of his son, *James Garnett Gibson*, testator directed that his widow should stand in the place of his deceased son, and proceeded as follows:—"I revoke the gift and bequest of the shares in the *London and Liverpool Fire and Life Assurance Office*, having parted with the same."

The testator died on the 10th of November, 1862.

At the date of his will testator was possessed of £1000 No. 1 Guaranteed Stock in the *North British Railway*, but did not own any other stock, debentures, or shares, in the *North British Railway*, or in any other railway amalgamated or connected therewith. In December, 1858, the testator, by five different sales, parted with the whole of this £1000 stock.

In January, 1859, he purchased £1000 ordinary stock in the *North British Railway*, but sold it again on the 27th of March, 1862; and in August, 1861, he purchased twelve preference £10 guaranteed shares in the *North British Railway*, which he sold on the 3rd of October, 1861. At the time of his death testator was owner of—

£150 *North British* New Guaranteed Stock (purchased on 29th of November, 1858).

Eleven *Border Union* Guaranteed Shares, of £10 each, of the *North British Railway Company.*

£410 *North British Railway—Edinburgh, Perth, and Dundee* Preference Stock (purchased in January, 1859).

£950 *North British Railway Company—Edinburgh, Perth, and Dundee* Debentures, Stock B—(purchased by four different purchases, between December, 1859, and the 30th of May, 1860).

In reference to the shares in the *London and Liverpool Fire and Life Assurance Office*, the will (to which the codicil purported to refer) did not in any way mention them.

Mr. *G. M. Giffard*, Q.C., and Mr. *D. Jones*, for the Plaintiff, contended that the legacy to testator's son, *Joseph*, was specific, as the testator, although he made use of inaccurate words of description, was clearly referring to the *North British Railway* stock in his possession at the time of his will, and such stock would have passed if it had remained in his possession until his death: *Trinder* v. *Trinder* (1). This specific legacy was adeemed by the subsequent parting with the stock, was not restored by the codicil, and consequently failed, the circumstances affording sufficient indication of the "contrary intention" required by the *Wills Act* (1 Vict. c. 26, s. 24), to prevent the bequest from being drawn down to the time of the testator's death: *Douglas* v. *Douglas* (2); *Goodlad* v. *Burnett* (3).

Mr. *Willcock*, Q.C., and Mr. *Winterbotham*, for testator's son, *Joseph*, contended that he was entitled to have his legacy satisfied out of the *North British* preference and debenture stock in the possession of the testator at the time of his death:—1. The description, "my one thousand *North British* preference shares," was equally applicable to the stock at the date of the will as to that held by him at his death. 2. The will being now made to speak from the death of the testator, the gift of "my shares" would carry all his subsequently acquired shares: *Lady Langdale* v. *Briggs* (4); *Goodlad* v. *Burnett* (3); *Doe* d. *York* v. *Walker* (5); while a gift of "one thousand of my shares" would give the legatee the power of selection: *Jacques* v. *Chambers* (6); *Millard* v. *Bailey* (7); and a gift of "my one thousand shares" must be equivalent in force to one or other of these expressions. 3. Assuming the legacy to have been specific at the date of the will, yet, although adeemed, it must be satisfied out of the subsequent purchases made after the ademption and before the codicil, which had the effect, under

(1) Law Rep. 1 Eq. 695.
(2) Kay, 400.
(3) 1 K. & J. 341.
(4) 8 D. M. & G. 391, 435, 436.
(5) 12 M. & W. 591.
(6) 2 Coll. 435.
(7) Law Rep. 1 Eq. 378.

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the old law, of republishing the will, so as to pass after-acquired property, there being no intention to the contrary apparent upon the codicil: while now, under 1 Vict. c. 26, s. 274, the will being drawn down to the time of the testator's death, if property can then be found to answer the bequest, the legacy is not defeated by the fact that the original subject-matter has been adeemed: *Lady Langdale* v. *Briggs* (1); *In re Earl's Trust* (2); *Avelyn* v. *Ward* (3), citing *Partridge* v. *Partridge* (4); *Drinkwater* v. *Falconer* (5).

Mr. *C. T. Simpson*, and Mr. *F. T. White*, for other parties.

SIR W. PAGE WOOD, V.-C.:—

I adhere to the opinion that I have before expressed as to the application of sect. 24 of the *Wills Act*, that when you find a mere specific thing, incapable of increase or diminution, in existence at the date of the will, but not in existence at the time of the testator's death, there is a sufficient indication upon the will of the "contrary intention" to which sect. 24 refers, to prevent the operation of the rule which makes the will speak from the death of the testator. Suppose a man to have, at the date of his will, a picture of the Holy Family by some inferior artist, and to give by his will "my Holy Family." He afterwards disposes of this picture, and subsequently acquires, by purchase or gift, a very much better one on the same subject, painted by an eminent artist. Would it not be a monstrous construction to hold that the picture existing in testator's possession at the time of his death would pass? When there is a clearly indicated intention upon the face of the will to give the single specific thing, and nothing else, it would be a very narrow construction of the words of sect. 24 to hold that you must sweep in everything to which the words might be held to apply, without the slightest reference to the state of things existing at the date of the will. The gift here was of "my one thousand *North British* preference shares." It is true that the testator had not at the date of his will 1000 shares, but £1000 guaranteed stock. But he had nothing else to which the words of the will could be applied, and no one could doubt that this stock

(1) 8 D. M. & G. 391. (2) 4 K. & J. 673. (3) 1 Ves. 420.
(4) Forr. Ca. temp. Talbot 226. (5) 2 Ves. 623.

was the thing pointed out by the will. After the date of his will he sold this £1000 stock, and purchased, not *uno ictu*, but bit by bit, a number of other shares or stock. This bit by bit purchase would not come within the reasoning of Lord *Hardwicke* in *Avelyn* v. *Ward* (1), as being a substitution of one entire fund for another. On the contrary, it was rather like the purchase of some totally different article. *Millard* v. *Bailey* (2) is palpably different from the present case, for the gift there was in effect, not of "my three black horses," but of "three of my black horses."

I adhere to my view, that where there is a distinct reference to a distinct and specific thing, and not to a *genus*, there is sufficient indication of a "contrary intention" to exclude the operation of the rule established by the 24th section of the *Wills Act*, and limit the operation of the will to the state of things existing at the date of the will. In this case the testator, at the time of his death, had not this specific stock in any shape. He had parted with it, and acquired by subsequent purchase a much larger number of shares. These subsequent purchases were not in any shape a replacing of the original fund, and there is nothing to lead the Court to suppose that, having once adeemed the specific bequest, the testator has replaced the identical thing. He has distinctly referred to one thing in his will, which was no longer in existence at the time of his death. That thing, and that only, can be considered as the subject of the bequest. I must, therefore, hold that the claim of *Joseph Gibson* to have his legacy satisfied out of the New Guaranteed *North British* Stock existing at the testator's death, fails.

Solicitors: Messrs. *Johnston & Jackson*; Messrs. *Rogerson & Ford*.

(1) 1 Ves. 423. (2) Law Rep. 1 Eq. 378.

V.-C. W.

1866

June 4, 22.

JEFFRYES *v.* AGRA AND MASTERMAN'S BANK.

Set-off—Banker's Lien—Marginal Receipts—Costs.

A. being indebted to bank *B.* for advances, handed to them certain marginal receipts of bank *C.* for £2000, representing deposits lodged there until advice of payment of certain bills on a firm at *Bombay*, and discounted by *A.* with that bank; the course of dealing being for bank *C.*, upon receiving the bills, to pay over to *A.*, or place to his credit in his banking account, less than the full discount value of the bills, retaining the difference as a security for payment in full at maturity of the discounted bills. When advised that the bills had been paid in full, the bank was in the habit of carrying over the retained margin to the credit of *A.* in his general banking account.

Notice of *A.*'s assignment of the marginal receipts was given by *B.* to *C.* on the same day that *A.*, who was largely indebted to *C.*, upon an overdrawn account, and upon contingent liabilities upon bills of exchange not then matured, suspended payment:—

Held, as between *B.* and *C.*, that *B.* was entitled to the £2000 covered by the marginal receipts, subject only to a set-off of any sums actually due and payable to *C.* by *A.* at the time when such marginal receipts became payable, upon liabilities contracted before notice was received by *C.* of the assignment to *B.*

Although the demand made by a Plaintiff may be too extensive, yet if the Defendants resist the demand *in toto*, they must pay the costs up to the hearing.

THIS was a suit by the public officer of the *Royal Bank of Liverpool*, for the purpose of establishing the right of that bank to a sum of £2550 held by the Defendants, the *Agra and Masterman's Bank, Limited*, under the following circumstances:—

The Defendant, *Louis Speltz*, who carried on business as a general merchant at *Liverpool*, employed both the *Royal Bank of Liverpool* and *Agra and Masterman's* as his bankers. In the course of his business he was in the habit of purchasing goods in this country for consignment to *India*, and drawing bills of exchange for the price upon the consignees to whom the goods were shipped. Such bills of exchange (in general made payable ninety days after sight) were negotiated by *Speltz* in *England;* and the bills of lading and other documents of title relating to the goods were handed over to the persons with whom the bills of exchange were negotiated, and

they forwarded the bills of exchange and documents to their agents in *India*. Those agents presented the bills of exchange to the consignees upon whom they were drawn, first for acceptance, and subsequently at maturity for payment; and upon payment of the bills, they handed them over together with the bills of lading and other documents, to the persons meeting the bills of exchange. In this manner the documents representing the goods always remained in the possession of the holders of the bills of exchange until the bills were paid, and by this means the payment in full of those bills at maturity was secured in every event, except that of an actual fall in the value of the goods below the sum drawn against them.

Some of the bills of exchange which were drawn by the Defendant, *Louis Speltz*, in manner above mentioned, were negotiated by him with the *Agra and United Service Bank, Limited*, and the course of dealing adopted between *Speltz* and that bank was, that upon the handing by him to the bank of such bills of exchange, the bank at once paid over to him, or placed to his credit in his banking account with the bank, somewhat less than the full discount value at that date of the bills handed over by him, and retained the difference between the sums thus placed at his disposal and the full value of the bills so purchased by them, to provide against any actual fall in the value of the goods, and by way of complete security to the bank for the payment in full at maturity of the bills so discounted. In each case a memorandum of receipt stating the purpose for which the sum therein mentioned was to be retained, and agreeing to pay interest thereon, was handed by the bank to *Speltz*.

In April, 1864, the Defendant *Speltz* was the holder of six bills of exchange, all dated the 22nd of April, 1864, and drawn for various sums, amounting in the whole to about 86,905 rupees: all such bills having been drawn by him upon Messrs. *Passmore & Co.*, of *Bombay*, against goods shipped by him to them.

On the 23rd of April, 1864, *Speltz* sold those six bills to the *Agra and United Service Bank*, which subsequently became the *Agra and Masterman's Bank, Limited*, for £8418 19*s.* 9*d.*, and thereupon indorsed and delivered the said bills to that bank. Out of this sum of £8418 19*s.* 9*d.*, only £7158 19*s.* 9*d.* was placed to the credit

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of *Speltz* in his current account, the balance of £1260, being, with his consent, retained by the bank and credited to *Speltz* in what was called by them "The Marginal Account." The margin was thus retained by the bank and credited to *Speltz* in the marginal account, until the bank received advice in *London* that the bills of exchange had been duly honoured at maturity in *India;* and upon receiving such advice, credit was given to *Speltz* in his general account for the margin, and also for the interest due thereon. In respect of the sum thus retained, the bank gave to *Speltz* a memorandum of receipt in the following terms:—

"The *Agra and United Service Bank, Limited.*

"*London*, 23rd April, 1864.

"Received on account of *L. Speltz*, Esq., the sum of £1260, to be held by this bank as security for payment of bills as overdated 22nd April, 1864, on Messrs. *Passmore & Co., Bombay*, and to bear interest at 1 per cent. below the *Bank of England* minimum rate, but not to exceed £3 per cent. per annum."

The amounts for which the bills referred to were drawn were indorsed upon this memorandum.

On the 30th of April, 1864, *Speltz* sold to the bank two more bills of exchange, drawn by him upon Messrs. *Passmore*. Upon this transaction a balance of £370 was retained by the bank. On the 25th and 29th of June *Speltz* sold other bills of exchange to the bank, and upon these transactions balances of £450 and £470 were retained by them; receipts similar in form to that of the 23rd of April, already set out, being in each case given.

In September, 1864, *Speltz* being pressed by the *Royal Bank of Liverpool* for payment of a debt, indorsed and handed over to them all these receipts under a memorandum thus worded:

"I beg to hand you enclosed, as securities for advances made to me in general account by your bank, receipts of the *Agra and Masterman's Bank* (for £2550, specifying them), representing deposits lodged there until advice of payment of certain bills mentioned therein on Messrs. *Passmore & Co.*, at *Bombay*. On advice of such payment I shall retire these deposit receipts, and until then I request you to hold them, and only to collect them yourself on my failing to take them up."

On the 11th of October following the *Bank of Liverpool* sent to *Agra and Masterman's*, for the first time, notice that they held, as security from *Speltz*, receipts of the *Agra and United Service*, and requesting information whether any of the said bills were paid, and "by your continuing to inform me from time to time as you receive advice of payment."

On the 12th of October the *Agra Bank* wrote in answer:—"We must beg to decline your application. Deposit receipts are not negotiable; they are subject to the bank's liens, and the bank cannot recognise your right to any information."

On the same day (12th of October) *Speltz* suspended payment, being then indebted to the *Agra and Masterman's* on his general account to the extent of £392, and also liable as an acceptor to a large amount in respect of bills drawn by or indorsed to the bank, and also liable, or contingently liable, in respect of bills indorsed by him to the bank, the liabilities in many of these cases being outstanding and future, and not in respect of sums then (12th of October, 1864), presently due and payable. Under these circumstances this bill was filed on behalf of the *Royal Bank of Liverpool*, by their registered public officer, praying that it might be declared that the Defendant, the *Agra and Masterman's Bank, Limited*, was a trustee for the *Bank of Liverpool* of the whole of the sums of £1260, £370, £450, and £470, mentioned in the deposited marginal receipts, and that they might accordingly be decreed to pay over those sums respectively, with interest.

The Defendant bank submitted, by their answer, that these sums were subject to their general lien as bankers, for securing not only payment of the particular bills of exchange, but also of the amount due and to become due to them from *Speltz* upon his general banking account, and that *Speltz* had always acquiesced in this course of dealing, which had been acted upon in the books of the bank, and in their pass book with *Speltz*.

Sir *H. M. Cairns*, Q.C., and Mr. *Ford North*, for the Plaintiffs, contended that the rights of the equitable assignees must prevail against any claim in respect of lien that might be asserted on behalf of the Defendants. The sums represented by the marginal receipts, having been deposited with the Defendants for a special

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purpose, were available for that special purpose only, and no general lien on them could be maintained on behalf of the Defendants in respect of any balance due to them upon the general account between themselves and *Speltz*. At all events, no such lien could be claimed in respect of debts not matured, arising upon bills indorsed by *Speltz*, which did not fall due until after the time when advice of payment or non-payment of the bills in respect of which these marginal receipts were given had been received: *Brandao* v. *Barnett* (1); *Wylde* v. *Radford* (2); *Cumming* v. *Shand* (3); *Davis* v. *Bowsher* (4).

Mr. *Rolt*, Q.C., and Mr. *Dickinson*, for the Defendants, contended that the general lien of the Defendants as bankers attached on any securities of the customer which might for any purpose have been placed in their hands, and that this general lien was not excluded by the special contract between *Speltz* and the Plaintiffs, there being nothing in that contract, either express or implied, which was in any way inconsistent with the general lien: *Jones* v. *Peppercorne* (5); *Bock* v. *Gorrissen* (6); *Inman* v. *Clare* (7).

This lien extended to an account running due, though not actually due, and would cover liabilities not then matured, and, at all events, discounts upon bills falling subsequently due, each of which was a *debitum in præsenti solvendum in futuro*; and the Plaintiffs, as the equitable assignees of *Speltz*, were not entitled, for the purpose of satisfying their present debts, to deprive the Defendants of the securities thus held by them.

But if the question did not turn upon lien, but upon set-off, the Defendants were entitled to a set-off in respect of all debts due to them from *Speltz*, and, at all events, as indorsees of the bills for the discounts, which constituted a present debt, the bills being only the security: *Ex parte Deeze* (8); *Ex parte Prescot* (9); *Alsager* v. *Currie* (10); *Alliance Bank* v. *Holford* (11); *The Agra and Masterman's Bank* v. *Hoffman* (12).

(1) 12 Cl. & F. 787.
(2) 33 L. J. (Ch.) 51.
(3) 5 H. & N. 95.
(4) 5 T. R. 488.
(5) Joh. 430.
(6) 2 D. F. & J. 434.
(7) Joh. 769.
(8) 1 Atk. 228.
(9) Ibid. 230.
(10) 12 M. & W. 751.
(11) 16 C. B. (N. S.) 460.
(12) 34 L. J. (Ch.) 285.

Sir *H. M. Cairns*, in reply, cited *Young* v. *The United Bank of Bengal* (1).

June 22. SIR W. PAGE WOOD, V.C., after stating the facts, continued:—

The first question which I have to consider is, what is the exact character of these notes? because the case is not precisely that of a deposit of a security in the ordinary shape or form, as title deeds, or a plate chest, or the like, as a security to the banker, which, being deposited for a specific purpose, can only be applicable to that purpose, and does not give rise to any claim of general lien on the part of the bankers, as was decided in *Brandao* v. *Barnett* (2). These documents, in truth, represent a debt due from the bank, with an engagement to pay that debt to the person to whom they give the receipt note upon a certain condition, and at a certain time, as far as that time is defined by the condition, namely, whenever they receive intelligence that the bills, in respect of the discount of which they reserved this right of retainer (they were retained by way of security) have been duly paid and satisfied. It is, in other words, a debt which will accrue from the bank on that event happening. The contention of the bank is, that, as against this debt in the first place, they have a right under the special arrangement to transfer all these bills into *Speltz's* account current, so that, as regarded his account current at least, there would be a set-off in respect of the bills so becoming due; that that was a course of dealing between him and them. I do not think that in reality anything turns upon that, one way or the other. It does not seem to me that any such special contract was made out, but it seems to have occurred from time to time without any special agreement, merely in the ordinary way of business. I do not think, in truth, that the principles upon which I must decide this case will be affected by that consideration one way or the other.

Then they say further, that there were very heavy liabilities outstanding, and that they should have retained when they became due these balances as against those outstanding bills. I

(1) 1 Moo. P. C. 150. (2) 12 Cl. & F. 787.

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apprehend they never could do that in any Court of law, and of course there is no equity of the kind; you cannot retain a sum of money which is actually due against a sum of money which is only becoming due at a future time.

The following seem to be the rights and position of the parties: We will first consider how the case would stand with *Speltz* alone, if he had not assigned over his rights. I apprehend that when the bankers were advised of these bills being paid the money would become a debt due from them. The receipt is a memorandum of a debt to become due under those circumstances. I do not think that it would have been possible for *Speltz* to say, "I only let you hold these until you should be advised of the bills being paid. I was then to be paid under any state of circumstances, whether I was largely your debtor or not." How could he have enforced such a payment? He could not; there would be a simple set-off at law, he would have brought his action for money then due, and there would have been a simple set-off at law for all sums actually due from him. I take it, as between *Speltz* and the bankers, that at all times when the bills became due, they would have been entitled to set off any moneys actually due from him to the bank, whatever the account should be. As to mere liabilities, it is equally clear that they could not set them off. How, then, is the case affected by the notice they received of the assignment of this debt on the part of *Speltz?* I apprehend that they cannot be in any worse position as to liabilities actually accrued before they had notice of the assignment, not matured when they had notice of the assignment, but matured when the debt became payable. They would have a right to say:—"We held all these various securities, we knew all our rights of set-off, we knew that when these became due there would be other debts due at the same time, and that we should set the one off against the other, and our right cannot be interfered with by any dealing of yours with strangers until we have notice of such dealing." The moment they have notice they cannot claim a set-off in respect of any debts not actually due at the time they received notice of the payment of the bills, for the notice would make them liable at once to be sued in respect of the several sums they had retained.

Therefore, what appears to me the proper decree to make is this,

to declare that the Plaintiff, as the public officer of the *Bank of Liverpool*, is entitled to be paid by the Defendant, the *Agra and Masterman's Bank*, the several sums of £1260, £370, £450, and £470, mentioned in the several memoranda of receipt in the bill set forth (therein called the "Marginal Receipts"), subject only to a set-off, as regards each of the said sums, of any monies actually due and payable to the said bank by the Defendant *Speltz* at the time when the said marginal receipts respectively became payable, upon liabilities contracted by *Speltz* before the 12th of October, on which day the Defendants, the bank, received notice of the assignment of the several above-mentioned sums from the Plaintiff as representing the *Liverpool Bank*. The Defendants, the *Agra and Masterman's Bank*, must pay the costs of the suit, inasmuch as they altogether rejected any acknowledgment of the transaction whatever. *Speltz*, of course, can have no costs, he being the debtor. There must also be an inquiry whether, at the time when the said several sums became due, any and what debt was due from *Speltz* to the Defendant bank on any liability contracted before the 12th of October, 1844. Let the said debt, if any, be set off.

Mr. *Rolt*:—With respect to the costs, your Honour will notice that the prayer is: "That it may be declared that the Defendant, the bank, is a trustee for the said *Royal Bank of Liverpool* of the *whole* of the said sums."

SIR W. PAGE WOOD, V.C.:—If a person demands a little more than he is entitled to, and you resist the demand *in toto*, I think you ought to pay the costs up to the hearing.

Solicitors: Messrs. *R. B. Lowndes*; Messrs. *Uptons, Johnson, & Upton*.

V.-C. W.
1866
June 27, 29.

FULLER *v.* CHAMIER.

Will—Construction—Rule in Shelley's Case.

Devise of freehold houses unto *A.*, *B.*, and *C.*, in equal shares, during only their natural lives, "and after their decease I give and bequeath the said freehold estate unto the next lawful heir of *A.* all the said freehold estate for ever:"—

Held, that the limitation fell within the rule in *Shelley's Case* (1), and that *A.* took an estate in fee simple.

THIS was a re-hearing. The bill was filed for the purpose of administering the estate of *Thomas Crookenden*, comprising, together with other property (both real and personal), three houses in *Whitechapel*, which were devised by his will upon certain trusts for the benefit of his children.

The decree in the suit assumed, upon the certificate of the Chief Clerk, and according to the impression of all parties, that the testator, *Thomas Crookenden*, was the owner of these houses in fee simple. Since the decree was made an old will affecting these houses, the existence of which was unknown to every person interested at the time when the decree was made, had been discovered.

This will, which was made by an uncle of the testator in the cause, also named *Thomas Crookenden*, was dated the 24th of August, 1773, and contained the following devise:—

"Item. I give and bequeath unto my sister, my three nephews, and two nieces aforesaid, all those my three messuages or tenements, being freehold, situated in *Rosemary Lane*, *Whitechapel*, two of them being in the tenure or occupation of *Joseph Hall*, and the other of *Mary Broome*, each adjoining to the other, with their and every of their rights, members, and appurtenances, equal share, during only their natural lives, and after their decease I give and bequeath the said freehold estate unto the next lawful heir of my nephew *Thomas Crookenden* after-mentioned, all the said freehold estate for ever."

Thomas Crookenden, the nephew, survived his aunt, and brothers

(1) 1 Rep. 93.

and sisters, and received the rents and profits of the houses until his death in May, 1842. The question upon the present re-hearing was, what estate he took under this devise: whether an estate in fee simple; or an estate for life only, with remainder in fee-simple by purchase to his heir-at-law: in which case the decree would be wrong, and the heir-at-law of *Thomas Crookenden*, the nephew, would be entitled as against his devisees.

Mr. *Rolt*, Q.C., and Mr. *C. M. Roupell*, for *Henry Crookenden*, claiming through *Edward Crookenden*, the heir-at-law of *Thomas Crookenden*, the nephew, contended that the case fell within the exception to the rule in *Shelley's Case* (1), established in *Archer's Case* (2), the testator having engrafted words of limitation on the devise to "the next lawful heir," which indicated an intention to treat the heir as purchaser; in other words, to make him, and not the first taker, the *stirps* from which the descent was to be traced.

They cited *Greaves* v. *Simpson* (3); *Chambers* v. *Taylor* (4).

Mr. *Willcock*, Q.C., Mr. *Cecil Russell*, and Mr. *H. Fox Bristowe*, for the Plaintiff, and Respondents in the same interest with the Plaintiff, contended *contrà* that the devise fell within the rule in *Shelley's Case*, and that *Thomas Crookenden*, the nephew, took an estate in fee simple. The words "next" and "lawful" might be excluded as having no special meaning, and the mere addition of the words "for ever" could not qualify or alter the operation of the term "heir" so as to make it a description of the person, and convert it into a word of purchase, as in *Archer's Case*.

Goodright v. *Pullin* (5); *Wright* v. *Pearson* (6); *Fearne's* Contingent Remainders (7).

SIR W. PAGE WOOD, V.C.:—

The question is, whether the well known rule in *Shelley's Case* is to apply here, or whether the exception to that rule established in *Archer's Case*, is to prevail, upon the ground that in the limi-

(1) 1 Rep. 93.
(2) 1 Rep. 66, *b*.
(3) 10 Jur. (N. S.) 609.
(4) 2 My. & Cr. 376.
(5) 2 Str. 729.
(6) 1 Eden, 119.
(7) Page 179 (and the cases there cited.)

V.-C. W. 1866 FULLER v. CHAMIER.

tation to the heir of the first taker there are engrafted words so as to give an estate in fee to that heir, supposing him to take as purchaser. This would be a very reasonable argument if the case had now to be considered for the first time, but I apprehend it will be found that the exception in *Archer's Case* was established upon the simple ground that the testator indicated an intention to attach words of limitation, so that the heir (in that case the "right and next heir" of the tenant for life) should take absolutely, by limiting the estate to that heir and to "the heirs of his body lawfully begotten for ever" (according to the "Pleadings in *Archer's Case* (1)," or (according to the report of the case which follows (2)), "to the heirs male of the body of such next heir male"—in a proper form to create an estate tail in that heir as purchaser. That case depended upon the limitation in the will being so extended that the persons taking the estate of inheritance should deduce their title from the heir (in the singular number) who was the first taker as the *stirps*. Clearly that was the principle upon which that decision proceeded. The difficulties that arose when *Shelley's Case* had to be determined were twofold. One was that, on a limitation of an estate for life to *A.*, with remainder to his heirs, without any words of limitation added: if the heir were treated as a purchaser there would be a question whether he would take the fee, as there were no added words conferring the fee upon him. There was also this difficulty (which was the prevailing reason), that the remainder to the heir would be a contingent remainder, and that the state of the law as it then existed appeared to require that the interest created by any instrument should be a vested interest as early as possible; and so the remainder to the heirs was immediately executed in the ancestor, because a contingent remainder would be liable to be destroyed, and the intention of the testator to be defeated in a variety of ways.

The intention of the testator was supposed to be an intention to convey an absolute interest to the person who was the object of his bounty and to the heir who came after him; and although it was plain and manifest that the first taker was intended to take for life only, yet as the limitation might have been defeated by construing it as a gift to the heir as purchaser, it was held that the

(1) 1 Rep. 64, *b*. (2) 1 Rep. 66, *b*.

particular intention of the testator (with regard to the first taker) must be sacrificed to his general intention to pass the property fully and absolutely to the family. That was the view taken in *Shelley's Case*, as explained in Mr. *Fearne's* very valuable work on Contingent Remainders. For the principles which I have been stating, I may refer to the passage at the end of p. 27 in that work (original paging), and to Mr. *Butler's* note immediately following, observing that if I were to construe this will as I am asked to do, by giving to the heir, as a purchaser, a remainder in fee simple, the remainder would be contingent, and subject to all the incidents attaching to contingent remainders. After the decision in *Shelley's Case* the Courts of equity determined that they would, as far as possible, follow the strict letter of the law in the construction of words of limitation as applied to equitable interests. Now, what are the words here? There is simply a limitation to *Thomas Crookenden*, the ancestor, and others, for their lives. That makes no difference, as there is abundant authority for shewing. Then follows the gift "unto the next lawful heir of my nephew *Thomas Crookenden*, all the said freehold estate for ever." There are no words of limitation, and the case is reduced to a gift simply to the next heir for ever. It appears to me that the case is really concluded by authority, having regard to that most valuable judgment of Lord Chief Justice *Eyre* in *Dubber* v. *Trollope*, reported in *Ambler* (1) (with, in Mr. *Blunt's* edition, the very valuable corrections from Mr. Sergeant *Hill's* MSS.) The limitation there was in default of issue of *W. T.* to *T. T.* for life, and after to the first heir male of his body lawfully begotten, and for want of such heir male over. Lord Chief Justice *Eyre*, who delivered the judgment of the Court of Common Bench, that by virtue of this limitation *T. T.* "became seised in tail to him and the heirs male of his body begotten," proceeded to consider the question very fully and minutely: "First, I would consider it as a devise to a man and the heir male of his body in the singular number, and what effect such a devise will have. Secondly, whether a devise of an express estate for life to the first devisee, previous to the limitation to the heir male, will at all vary the case from a plain devise to him and the heir male without any such

(1) Page 453.

V.-C. W. 1866 FULLER v. CHAMIER.

previous limitation for life?" After stating certain other branches of the question, not material for the present case, his Lordship thus proceeded: "Another case is in *Styles* (1)—*Bawsy* v. *Lowdal.* The words of the book are, If *A.*, seised of a copyhold in fee, surrender it to the use of his will, and afterwards by his will deviseth it to *B.*, his cousin, for his life, and after his death to the heir of his body begotten for ever; in this case the word *heir* being limited to the body of *B.*, is *nomen collectivum*, and all one with the word *heirs*, and the words *for ever* which in a devise make a fee, are only put to shew his intention, as usual when land is given to one and his heirs for ever; and, therefore, in this case, it is a fee executed in *B.*, and his heirs are in by descent and not by purchase. And this is not like to *Archer's Case* (2), where the devise was to one for life, and after to his heir male and to the heirs male of such heir male; which shews that the words *for ever* were not made use of as a reason to help out the words *heir male* in the singular number, which was offered as an answer to these last cases." And further on in the judgment: "It must be confessed that the devise of the express estate for life, the remainder to the next heir male in the singular number, is said in the report of *Archer's Case* to be the reason why the Court adjudged it an estate for life. But in no case since that time has it been considered or understood as a resolution upon that simple ground; but the subsequent limitation to the heirs male of such heir male has been looked upon as the true foundation for that resolution. It is said by *Hale* (3) that a devise to one for life, and after his decease to his heir, hath been held a fee, for heir is *nomen collectivum.* But *Archer's Case*, says he, is a devise to *A.* for his life, and after to his heir, and to the heirs of such heir, in which case he says that because the words of limitation were put to the word *heir;* therefore *heir* was taken to be *designatio personæ*, and resolved that he should take by purchase. And upon the same foot is this case of *Archer's* treated (4) in *Bawsy* v. *Lowdal*, and *Styl.* (5)."

It is not, perhaps, very clearly expressed, but what I understand the judgment to mean is this, that the words "*for ever*" make no

(1) Page 249; 1 Ro. Abr. 627.
(2) 1 Rep. 66, *b.*
(3) 1 Vent. 215.
(4) 1 Ro. Abr. 627.
(5) Page 249.

difference, although they would be quite enough to create a fee. But it is necessary that there should be a clear and distinct limitation to the heir in the singular number, with a limitation over to his heirs in the plural number, in order to shew that the singular "*heir*" is made the *stirps*, and that the descent is to take place from him.

So far I agree with Vice-Chancellor *Kindersley*, in *Greaves* v. *Simpson* (1), that the decision in *Archer's Case* did not rest upon the ground that the words of gift to the heir of the first taker and the superadded words imported precisely the same estate. Taking *Archer's Case*, the reasoning appears to have been this, that although upon the construction given there was the difficulty of the remainder being merely contingent, yet that the testator's intention was so clearly expressed as to take the case out of the rule in *Shelley's Case*. Lord Chief Justice *Eyre*, in his judgment in *Dubber* v. *Trollope*, seems to have thought, and very sensibly, that you could not except a limitation from that rule, merely on account of the use of the words "for ever." I find here nothing more than the superadded words "for ever," and I do not think that they are sufficient to shew an intention in the testator to execute the estate in the heir as *persona designata*, so as to convert him into a purchaser. It is clearly, in my opinion, an estate executed in the ancestor, and these superadded words simply amount to an indication that the next heir male shall take in perpetual succession.

MINUTE:—Declare that, according to the true construction of the will of 1773, *Thomas Crookenden*, the nephew, took an estate in fee simple in the houses devised to him by the said will.

Solicitors: Messrs. *Hollingsworth, Tyerman, & Green;* Messrs. *Brundreth, Martin, Randall, & Govett;* Messrs. *Broughton & White.*

(1) 10 Jur. (N. S.) 609.

V.-C. W.
1866
July 26, 30.

PEASE v. COATS.

Covenant—Construction—Words—Public-House.

Upon a purchase of land, the purchaser covenanted with the vendors not to carry on upon the property certain offensive trades or any business which was or might be deemed a public or private nuisance, nor to use any building which should be erected thereon "as a public-house for the sale of beer, wine, malt liquors, or spirits":—

Held, that the sale of beer by retail, under a license "not to be drunk on the premises," was no breach of the covenant.

MOTION for an injunction to restrain the Defendant from selling beer at the house mentioned in the bill, and from using the house and premises, or permitting the same to be used, for the sale of beer, wine, malt liquors, or spirits.

The Plaintiffs, the *Saltburn Improvement Company*, had purchased a tract of land at *Saltburn-by-the-Sea*, with a view to granting it out for building purposes and establishing a watering-place there. The land was divided into lots, and the purchaser of each lot was required to execute a deed of covenant against offensive trades, which, so far as is material, was as follows:—

"That the purchaser, his or her heirs, appointees, or assigns, or his, her, or their tenants, shall not, nor will at any time hereafter, use, exercise, or carry on, or permit to be used, upon the lots purchased by him, or any part thereof, or the building or buildings to be executed thereon, any of the trades or businesses of a tanner, currier, fellmonger, soap-boiler, candle-manufacturer, tallow-melter, nightman, tripeman, blacksmith, or farrier, or any manufactory, trade, business, or employment whatsoever, which is or may be deemed a public or private nuisance, and no building or buildings which shall be erected on any of the lots shall be used as a public-house for the sale of beer, wine, malt liquors, or spirits, without the consent in writing of the vendors, their heirs or assigns, for that purpose first had and obtained."

This covenant was executed by a Mr. *Wallis*, who purchased one of the lots in the course of last year, and had built a house

upon it, which was now in the possession of the Defendant. In December last the Defendant sent in a written application to the Plaintiffs for permission to sell beer at his house, not to be drunk on the premises, but permission was refused. In May last the Defendant obtained a retail beer and cider license, not to be consumed on the premises. By this license, which was headed under the following Acts, 1 Will. 4, c. 64; 4 & 5 Will. 4, c. 85; 3 & 4 Vict. c. 61; and 11 & 12 Vict. c. 49, the Defendant was authorized "to sell beer, ale, and porter, cider, and perry, by retail in the said dwelling-house and in the premises thereunto belonging, but not to be drunk or consumed in the said house or premises."

The bill was filed for the purpose of restraining such sale, and the question was simply whether a house open for the sale of beer "not to be drunk on the premises" was a public-house for the sale of beer, &c., within the terms of the covenant.

The motion for an injunction was by consent turned into a motion for decree.

Mr. *G. M. Giffard*, Q.C., and Mr. *Fry*, for the Plaintiffs, contended that there had been a clear breach of the covenant, which must be read disjunctively, *i.e.*, "no building, &c., shall be used as a public-house, *or used* for the sale of beer, wine, &c."

[They referred to *Wilson* v. *Hart* (1).]

Mr. *Rolt*, Q.C., and Mr. *Cecil Russell*, for the Defendant, contended that the Court must look at the whole scope of the covenant, which was framed for the purpose of restraining a general class of nuisances to the locality from smell, noise, or other disturbance, and not the opening of a house for the mere sale of beer which must be carried away by the purchasers, and could not be drunk on the premises except under a penalty of £20. The covenant could not be read disjunctively, or with superadded words, as was proposed by the Plaintiffs; but being in restraint of trade must be construed strictly.

In *Jones* v. *Thorne* (2), a covenant against carrying on trades which might "be, or grow, or lead to be offensive, or any annoyance or disturbance," was held not to extend to a public-house.

(1) Law Rep. 1 Ch. 463; 2 H. & M. 551. (2) 1 B. & C. 715

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So in *Simons* v. *Farren* (1), carrying on the business of a retail brewer was held to be no breach of a covenant not to carry on the business of a common brewer. A public-house was a house to which men might resort for drink, and "kept for entertainment," according to the definition given by *Parke*, B., in *Marks* v. *Benjamin* (2). The Defendant did not entertain the public, and his house, wherein beer could not be drunk under a penalty of £20, was no more a public-house than were the shops of *Fortnum & Mason*, or *Hedges & Butler*, where wine and bottled ale could be purchased.

Mr. *Giffard*, in reply.

The VICE-CHANCELLOR:—Your construction seems to strike out the word "public" from the covenant. What is your definition of a "public-house?"

Mr. *Giffard*:—A house which is open for the public sale of beer to the public. Taking this definition to be correct, the Defendant has committed a breach of the covenant.

July 30. SIR W. PAGE WOOD, V.-C. (who had been in the meantime referred to the various Licensing Acts):—

It is curious enough to observe how little one finds in the way of authority upon this word "public-house," which seems to be a word of quite modern introduction, the word "alehouse" being that originally used in the earlier editions of the works relating to the subject; the word "public-house" being placed in the margin of the last edition of *Burn's* Justice against the title "alehouse," while the word "inn" is used with this observation, "or, as it is now more generally called, a 'public-house.'" Nor is much assistance to be derived from the various Licensing Acts. The provision contained in 11 Geo. 4 & 1 Will. 4, c. 64, s. 31, that a covenant against houses being used as public-houses or alehouses should apply to persons licensed under that Act to sell beer by retail, seems to indicate that it was thought by

(1) 1 Bing. N. C. 126. (2) 5 M. & W. 565.

the Legislature that even houses licensed as houses where beer might be drunk would not come under the term "public-house." By that Act, persons were enabled to take out an excise license for the sale of beer by retail without applying to the magistrates; and the Legislature thought it necessary, by sect. 31, to provide that covenants not to use a house as a public-house or alehouse should extend to persons licensed under that Act in cases between landlord and tenant, and thus would seem to have thought that such a covenant as this would not, without the express saving clause, have extended to licenses even under that Act, such licenses being for selling beer to be consumed on the premises. I approach the question, therefore, without much assistance from the Acts of Parliament, and what little indications are to be found in them seem adverse to the contention of the Plaintiffs. The point that has most weighed with me is, that if I construed the covenant as the Plaintiffs ask me to do, I should have, this covenant being disjunctive, to strike out the word "public" altogether. I must apply it to every grocer's shop, such as *Fortnum & Mason*, or *Hedges & Butler*, where wine is sold by retail, and all meaning of the word "public" would thus be destroyed. Moreover, the deed of covenant is dated after all these Acts of Parliament; and if it had been intended to introduce a restriction against the sale of beer *simpliciter*, it would have been easy to have done so. Further than this, the covenant is directed against nuisances of a local character, arising from offensive smells, and the noise and disturbance that would be occasioned by a parcel of tipplers congregating about any of the houses or the property. I cannot, therefore, hold the sale of beer under a license not to be drunk on the premises to be within the restriction contained in the covenant. As the question arises on a point of law, the bill must be dismissed with costs.

Solicitors: Messrs. *R. J. Jarvis;* Messrs. *Williamson & Hill.*

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1866

July 20, 28.

JEWAN *v.* WHITWORTH.

Factors' Acts (6 *Geo.* 4, *c.* 94, *and* 5 *&* 6 *Vict. c.* 39)—*Pledge by Factor—Antecedent Debt.*

H., a speculator in cotton, in July, 1864, requested *W.* to purchase for him, in *W.*'s name, 400 bales of Egyptian cotton, for delivery in the September following. *W.* assented, employing for the purpose (with the knowledge of *H.*), as his broker, *C.*, who knew that *W.* was acting as agent, and *W.* became liable on a series of contracts, the first of which was due on the 9th of September. The price of cotton falling, *C.* refused to take up the contracts unless he was secured from loss, and *W.* applied to *H.*, who, on the 8th of September, promised to give some security, and on the 26th of September, deposited with *W.*, and *W.* deposited with *C.*, with unconditional power of sale, a bill of lading of a cargo of *Surat* cotton of which *H.* was the consignee from the Plaintiffs, a firm at *Bombay*, as their factor; but *H.* was not known either to *W.* or to *C.* to be other than the true owner. On the same day, *C.* made a first payment on account of *W.*'s indebtedness under the contracts; and he continued to make other payments, *W.* not advancing anything. In October *H.* stopped payment, and the proceeds of the cargo of *Surat* cotton were now claimed by the Plaintiffs:—

Held, that the deposit of the bill of lading by *H.* was not made in respect of an antecedent debt of *H.* to *W.* within the meaning of the *Factors' Acts*; and that having been made by *H.* in respect of an advance by *C.* on behalf of *W.*, within the meaning of the same Acts, it was binding on the Plaintiffs.

THE Plaintiffs, *Soozpall Jewan* and others, a firm of Parsee merchants (carrying on business under the name of *Sewjee Soozpall*) at *Bombay*, in June, 1864, through *Macnee & Co.* of *Bombay*, shipped on board the *Floating Light* 243 bales of cotton, and consigned them to the Defendant, *Edward Hornby Hodgson* (carrying on business under the firm of *Hodgson, Mather, & Co.*), of *Liverpool*, of whom *Macnee & Co.* were the foreign agents; and on the 23rd of June, 1864, *Macnee & Co.* wrote to *Hodgson & Co.* as follows:—

"We beg to advise *Sewjee Soozpall's* draft, No. 254, on your goodselves in our favour, and endorsed for £4950, which please protect on presentation. The draft is made against a shipment of cotton, documents for which will go by next mail."

On the 8th of July, *Macnee & Co.* wrote to *Hodgson & Co.* as

follows:—"We have the pleasure to advise the under-mentioned consignment to your care, to which we request your best attention;" and the letter proceeded to describe the goods, and enclosed a bill of lading to *Hodgson*, "unto order or assigns," and two policies of insurance on the cotton, effected in the Plaintiffs' names, one with the *Hong Kong Insurance Company*, for 60,000 rupees, the other with the *Bombay Alexandra Company*, for 29,910 rupees.

The draft, on its arrival, was duly accepted by *Hodgson & Co.*, and discounted by *Hodgson* with the Defendants, the *Commercial Bank Corporation of India.*

In the previous month of April, *Hodgson*, who was a purchaser of cotton on his own account, had requested the Defendant, *James Whitworth* (carrying on business under the firm of *Whitworth & Co.*), of *Liverpool*, to purchase for him, but in the name of *Whitworth & Co.*, 800 bales of Egyptian cotton, for forward delivery, and *Whitworth* had made the purchase through his brokers, the Defendants, *John Leigh Clare* and *William Leigh Clare* (who were in business under the firm of *Clare & Sons*), of *Liverpool*, on account of *Hodgson.*

In July, 1864, *Whitworth*, also through the *Clares*, purchased for *Hodgson* 400 other bales of Egyptian cotton, for delivery in September. In both instances the invoices were made out in the name of *Whitworth & Co.*, as having been purchased through *Clare & Sons*, so that *Clare & Sons* were not liable to the vendors, but *Whitworth* was liable to the full extent of any loss.

In August the 800 bales of Egyptian were sold at a loss, amounting to upwards of £1000, for which sum *Hodgson* was indebted to *Whitworth*, and *Whitworth* was indebted to the *Clares*, who alone advanced the money.

On the 1st of September, the sellers of the 400 bales gave notice to *Clare & Sons* that the cotton was ready for delivery. *Whitworth*, being liable in respect of these 400 bales on nine separate contracts, the first of which fell due on the 9th of September, and the rest on subsequent days, was pressed by *Clare & Sons* to provide them with a "margin" against the loss; and on the 8th of September, *Whitworth* applied to *Hodgson*, both for payment of his old debt, and for a margin against loss on

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the 400 bales. In answer to this, *Hodgson* promised to make a cash payment, and to deposit some *Liverpool Commercial Bank* shares. On the 9th of September, *Whitworth* again pressed *Hodgson* for the promised margin, and *Hodgson* then offered to deposit with him a bill of lading for fifty-one bales of cotton per *Priam*, and another for sixty-one bales per *Gertrude*, duly covered by insurance. *Whitworth* upon this, without disclosing the name of his principal, wrote to *Clare & Sons*, stating that his firm would consent to hold the two last-mentioned bills of lading to the order of *Clare & Sons*, as a security against loss: and *Clare & Sons*, on the 22nd of September, wrote to say they could only receive them as a margin "on condition that your friends give you a letter placing them in your hands as security for loss on the 400 bales Egyptian, and give you a power of sale. On this being done, you can retain them, giving us a letter that you hold them for our account on the same terms." The two bills of lading were accordingly handed by *Hodgson* to *Whitworth*, with an unconditional power of sale; but the estimated loss on the 400 bales amounting on the 23rd of September to £7500, and the market continuing to fall, *Clare & Sons* insisted that they must have a further margin, or must refuse to carry out the pending engagement for purchase; whereupon, on the 26th of September (the estimated loss being now between £8000 and £9000), *Hodgson* proposed to deposit with *Whitworth* the bill of lading for the 243 bales of *Surat* cotton ex *Floating Light*, with the policies of assurance and an unconditional power of sale over the 243 bales, and the sixty-one bales per *Gertrude;* the bill of lading for the fifty-one bales per *Priam* being returned to *Hodgson*. This arrangement was agreed to and carried out, and *Whitworth* having, on the 26th of September, received from *Hodgson* the bill of lading for the 243 bales, deposited it on the same day with *Clare & Sons*, with an unconditional power of sale. The policies of insurance on the 243 bales were endorsed and handed over by *Hodgson* to *Whitworth*, and by *Whitworth* to the *Clares*, on the 12th of October.

Clare & Sons, having received the bill of lading for the 243 bales ex *Floating Light*, which were of the insured value of £8991, and having handed back to *Whitworth* the bill of lading for the

fifty-one bales ex *Priam* of the insured value of £2040, leaving to themselves a security of £6951, paid, on account of *Whitworth's* indebtedness on the above contracts (and two others of smaller amount), on the 26th of September, £173 8*s.* in cash, and on the 27th of September, £2677 10*s.* 1*d.* in drafts. On the 30th of September they received a portion of the 400 bales, and on the 1st of October they received the rest, and having done so, they paid in discharge of *Whitworth's* remaining indebtedness, on the 30th of September and other days up to the 28th of November, various sums, amounting together to £7730 6*s.* 11*d.*, making, with the above mentioned two sums, a total exceeding £10,500.

On the 21st of October, 1864, *Hodgson* suspended payment. The *Floating Light* was lost on its homeward passage. The Defendants, *Gledstanes & Co.*, the agents of the *Hong Kong Insurance Company*, had received, and now held, £6000, the amount of one of the insurances; and the Defendants, *S. P. Framjee & Co.*, as agents of the *Bombay Alexandra Company*, had received £2991, the amount of the other. On being applied to on behalf of the Plaintiffs, both the insurance agents replied to the effect that their settlement, if made, would be with the holder of the policy and the bill of lading duly indorsed.

This bill, filed on the 13th of January, 1865, stated that the Plaintiffs were willing to retire the acceptance for £4950; and prayed for a declaration that the deposit of the policies and the transfer and indorsement of the bills of lading, with and to *Whitworth & Co.*, were invalid as against the Plaintiffs, and conveyed no right against them; also that the alleged deposit and transfer to *Clare & Sons* were invalid against the Plaintiffs, and that the Plaintiffs were entitled to the insurance moneys.

The Defendant *Whitworth*, by his answer said, that when he received the bills of lading and policies of assurance of the 243 bales from *Hodgson*, he had no notice or knowledge that the Plaintiffs had or claimed to have any interest therein, and he believed *Hodgson* to be the absolute owner.

The Defendants, *Clare & Sons*, by their answer, said that, but for the transfer and deposit of the bills of lading and policies, in the manner above mentioned, they certainly should not have completed the contract; and they accepted the same in the faith that

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Whitworth's principals had full right to deal with them, and that *Whitworth* had full power to deposit the documents.

Mr. *Rolt*, Q.C., and Mr. *W. F. Robinson*, for the Plaintiffs:—

Hodgson, being our agent, had no authority to deposit these goods, and could make no title to the Defendants.

The transaction is not protected by the *Factors' Acts*, 6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39 (1), because in truth, it was a pledge

(1) The sections of the Acts referred to were the following:—

6 Geo. 4, c. 94, s. 2.

"Any person or persons intrusted with, and in possession of, any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant, or order for delivery of goods, shall be deemed and taken to be the true owner or owners of the goods, wares, and merchandize, described and mentioned in the said several documents hereinbefore stated respectively, or either of them, so far as to give validity to any contract or agreement thereafter to be made or entered into by such person or persons so intrusted, and in possession as aforesaid, with any person or persons, body or bodies, politic or corporate, for the sale or disposition of the said goods, wares, and merchandize, or any part thereof, or for the deposit or pledge thereof, or any part thereof, as a security for any money or negotiable instrument or instruments advanced or given by such person or persons, body, or bodies, politic or corporate, upon the faith of such several documents, or either of them: Provided such person or persons, body or bodies, politic or corporate, shall not have notice by such documents or either of them, or otherwise, that such person or persons so intrusted as aforesaid, is or are not the actual and *bonâ fide* owner or owners, proprietor or proprietors of such goods, wares, or merchandize so sold, or deposited, or pledged as aforesaid; any law, usage, or custom to the contrary thereof in anywise notwithstanding."

Section 3:—

"Provided always, and be it further enacted, that in case any person or persons, body or bodies, politic or corporate, shall, after the passing of this Act, accept and take any such goods, wares, or merchandize, in deposit or pledge, from any such person or persons so in possession and intrusted as aforesaid, without notice as aforesaid, as a security for any debt or demand due and owing from such person or persons so intrusted and in possession as aforesaid, to such person or persons, body or bodies, politic or corporate, before the time of such deposit or pledge, then, and in that case, such person or persons, body or bodies, politic or corporate, so accepting or taking such goods, wares, or merchandize in deposit or pledge, shall acquire no further or other right, title, or interest in or upon, or to the said goods, wares, or merchandize, or any such document, as aforesaid, than was possessed, or could or might have been enforced by the said person or persons so possessed and intrusted as aforesaid, at the time of such deposit or pledge, as a security as last aforesaid; but such person or persons, body or bodies, politic or corporate, so accepting or taking such goods, wares, or merchandize, in deposit or pledge, shall, and may acquire, possess and enforce such right, title, or interest as

given to secure an antecedent liability due from *Hodgson* to *Whitworth: Learoyd* v. *Robinson* (1).

was possessed and might have been enforced by such person or persons so possessed and intrusted as aforesaid; any rule of law, usage, or custom, to the contrary notwithstanding."

5 & 6 Vict., c. 39, s. 1.

"And whereas advances on the security of goods and merchandize have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to *bonâ fide* advances upon goods and merchandize as by the said recited Act (6 Geo. 4, c. 94) is given to sales, and that owners intrusting agents with the possession of goods and merchandize, or of documents of title thereto, should in all cases where such owners by the said recited Act, or otherwise, would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien, for any advances *bonâ fide* made on the security thereof. . . . . Be it therefore enacted . . . . That from and after the passing of this Act, any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security, *bonâ fide* made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment, made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent."

Section 2:—

"And be it enacted, that where any such contract or agreement for pledge, lien, or security, shall be made in consideration of the delivery or transfer to such agent of any other goods, or merchandize, or document of title, or negotiable security, upon which the person so delivering up the same had at the time a valid and available lien and security, for or in respect of a previous advance by virtue of some contract or agreement made with such agent, such contract and agreement, if *bonâ fide* on the part of the person with whom the same may be made, shall be deemed to be a contract made in consideration of an advance within the true intent and meaning of this Act, and shall be as valid and effectual, to all intents and purposes, and to the same extent, as if the consideration for the same had been a *bonâ fide* present advance of money: Provided always, that the lien acquired under such last-mentioned contract or agreement upon the goods or documents deposited in exchange, shall not exceed the value at the time of the goods and merchandize which, or the documents of title to which, or the negotiable security which shall be delivered up and exchanged."

Section 3:—

"Provided always, and be it enacted,

(1) 12 M. & W. 745.

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At all events, the balance, after deducting the value of the cargo ex *Priam* at the price of the day, belongs to us.

Mr. *G. M. Giffard*, Q.C., and Mr. *Kekewich*, for the official liquidator of the bank, which was being wound up, took no part in the argument.

Mr. *Baggallay*, Q.C., Mr. *A. E. Miller*, and Mr. *O. L. Clare*, for *Whitworth*:—

The transaction is not within the *Factors' Acts* at all. *Hodgson* was not given out to the world, or known to men of business at *Liverpool*, as a factor of the Plaintiffs. He was held out by the Plaintiffs to be, and was believed to be, a purchaser from them; and must be taken in equity to have been, as far as *Whitworth* is concerned, the absolute owner of the property. The bill of lading was made payable to his order, just as it would have been if he had been actual owner: *Hoare* v. *Dresser* (1); and he accepted the bill of exchange. We do not allege fraud; but the Plaintiffs, who, to suit their own arrangements, permitted this to be done, must take the consequences.

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that this Act and every matter and thing herein contained, shall be deemed and construed to give validity to such contracts and agreements only, and to protect only such loans, advances, and exchanges as shall be made *bonâ fide*, and without notice that the agent making such contracts or agreements as aforesaid has not authority to make the same, or is acting *malâ fide* in respect thereof against the owner of such goods and merchandize; and nothing herein contained shall be construed to extend to or protect any lien or pledge for, or in respect of, any antecedent debt owing from any agent to any person with, or to whom, such lien or pledge shall be given, nor to authorize any agent intrusted as aforesaid, in deviating from any express orders or authority received from the owner; but that, for the purpose and to the intent of protecting all such *bonâ fide* loans, advances, and exchanges as aforesaid (though made with notice of such agent not being the owner, but without any notice of the agent's acting without authority), and to no further or other intent or purpose, such contract or agreement as aforesaid shall be binding on the owner and all other persons interested in such goods."

Section 4:—

". . . . Any payment made, whether by money, or bills of exchange, or other negotiable security, shall be deemed and taken to be an advance within the meaning of this Act; and an agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this Act, to have been intrusted therewith by the owner thereof, unless the contrary can be shewn in evidence."

(1) 7 H. L. C. 290, 322.

The case comes within the general equity, that a person intrusted with goods, and seeming to be the owner, can bind them as against third parties. This equity is not restricted or interfered with by the statute, which was passed to protect factors only, who are known to be such, and who deal with others on that footing.

The principle of this class of cases is laid down by Lord *Hardwicke*, in *Snee* v. *Prescot* (1), a case which is stated by Mr. Justice *Buller*, in his opinion delivered to the House of Lords in *Lickbarrow* v. *Mason* (2), to have been departed from only because it was a case in equity, a reason which will scarcely be of weight in this Court.

Supposing, however, that *Hodgson* was a factor of the Plaintiffs within the statutes, then this was a valid pledge within the meaning of the *Factors' Acts*. It was made *bonâ fide* for a "further or continuing advance," in the shape of a further liability entered into by *Whitworth* on *Hodgson's* behalf; *Whitworth* had no notice of the agency, and therefore, could not have known that *Hodgson* was an unauthorized agent; nor was it made for an antecedent debt of *Hodgson's* to *Whitworth*.

Can this be said to have been an antecedent debt? Before the 9th of September, when *Whitworth* first came under liability, there was a bargain for "margin" whenever it might be demanded. This particular bill of lading was not ante-dated, but when it was given it related back to the prior contract.

At least, the Defendants are entitled to the proceeds to the extent of the value of the cargo ex *Priam*.

Vancasteel v. *Booker* (3) was also cited.

Mr. *W. M. James*, Q.C., and Mr. *Bardswell*, for *Clare & Sons*:—

If *Hodgson*, as the Plaintiffs say, was their agent, the deposit by him was a valid pledge within the statutes. *Whitworth* was a mere trustee for us. It was solely by pressure on our part that the security was obtained.

On the 26th of September we took the security, and on the same day we made the first payment. This cannot, therefore, be said to have been an antecedent debt. There was no debt till we first advanced money on the 26th of September.

(1) 1 Atk. 245. (2) 6 East. 24 (*n*). (3) 2 Ex. 691.

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The loss must fall upon the Plaintiffs, who trusted *Hodgson*.

As soon as *Hodgson* accepted the draft, he was mortgagee as well as factor, and the legal property vested in him. A bill of lading, in the absence of fraud, is negotiable precisely like a bill of exchange.

Mr. *S. Osler*, for the Defendant, *Hodgson*:—

Hodgson, believing himself to be solvent at the time of this transaction, was not bound to set apart the proceeds of a particular shipment to meet a particular acceptance: *Inman* v. *Clare* (1).

Mr. *Rolt*, in reply:—

The substantial question is, was there, or was there not, an antecedent debt?

The Defendants say, first, that the *Factors' Acts* only apply to factors dealing as such, and known to be such, and that, though *Hodgson* was our factor, yet, as between him and them, he must be treated as absolute owner; and, secondly, as to *Whitworth*, if the Act of 5 & 6 Vict. applies, that there was an antecedent promise to which the actual delivery of the documents relates back, and that there was no antecedent liability when that promise was given.

In *Navulshaw* v. *Brownrigg* (2), Lord *St. Leonards* points out what was the state of the law which the *Factors' Acts* were passed to remedy. He observes that the common law was very strict; not only the factor could not pledge goods, but even where he had accepted bills for his principal, he could not pledge the goods so as to give the pledgee the right to retain the produce, even to pay bills drawn upon the factor, and paid by the pledgee to the honour and credit of the principal. It was to remedy this inconvenience that the Acts were passed. No doubt the statutes were intended to relieve persons dealing with factors, but as regards the right of property in goods, that must be the same as it was before the statutes, except where they interfere. In this case, accordingly, the goods remain our property, notwithstanding *Hodgson's* dealings, if, as some of the Defendants have contended, and we say, the *Factors' Acts* do not apply.

Was this transaction a pledge for an advance within the 5 & 6

(1) Joh. 769. (2) 2 D. M. & G. 441.

Vict. c. 39, at all? The pledge was made neither for an "original loan, advance, or payment," nor for a "further, or continuing advance in respect thereof." It was made to secure nothing else than a liability under a contract then in existence. The Act says, sect. 4, that "any payment made, whether by money, or bills of exchange, or other negotiable security," shall be taken to be an advance within the Act. This obligation was not a payment by either of these means.

Further, can it be said that this deposit was not made in respect of an antecedent debt? The true meaning of the statute of Vict. with regard to an antecedent debt is explained by Lord *St. Leonards,* in *Navulshaw* v. *Brownrigg* (1), to be, that a person who is already under an obligation, is to be no better off for getting into his hands the property of others. Such a man is not to be bettered by the *Factors' Acts.* In this case the deposit by *Hodgson* was made in fulfilment of a previous promise to give security. As against us, who had not promised any security, this deposit by our factor, of our goods, at a date subsequent to the 9th of September, when his further liability was incurred, must be held to have been a pledge in respect of an antecedent debt. Moreover, the factor was already under other liability, and that was also an antecedent debt.

As between *Whitworth* and the *Clares,* it is impossible to say that *Whitworth* was our factor. He was in wrongful possession of our goods, and the deposit by him with the *Clares* cannot be protected by the statutes.

If *Whitworth* was not our factor—if the deposit by *Hodgson,* who was our factor, was made in respect of an antecedent debt—or, if it was made, not in respect of an original loan, advance, or payment, and not in respect of a continuing advance—on either ground separately, the Plaintiffs are entitled to relief.

SIR W. PAGE WOOD, V.C.:—

This case raises a point of some nicety under the *Factors' Acts.*

I take it as quite clear, and, indeed, it is hardly disputed, that, as between the Plaintiffs and *Hodgson & Co., Hodgson & Co.* were in the position of agents.

(1) 2 D. M. & G. 450.

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4 Eq 320,-4

The next thing that occurs is this [His Honour stated the facts, and continued]:—

Upon that state of things, what appears to me to be the result of the whole transaction is this. At the time when this transaction of the delivery of the bills of lading took place, *Whitworth* had entered into an engagement on behalf of *Hodgson & Co.*, which must have ultimately become a debt from *Hodgson* to *Whitworth*. It was not an actual debt, because until *Whitworth* paid money, there was no debt as between him and *Hodgson*. When the contract fell due, *Whitworth* became liable to the cotton sellers, but, as between himself and *Hodgson*, a debt arose only at the moment when he first paid any money. Then *Whitworth* (I must assume with the knowledge of *Hodgson*) has recourse to the *Clares*—his brokers. *Hodgson* says the bills of lading were given to *Whitworth* expressly on the ground that the *Clares* were pressing him for some security; and the *Clares*, on the other hand, say that they made the advances on the faith of these bills of lading, and that, but for the deposit of these bills, they should undoubtedly never have made the advance.

I think I should be putting a very narrow construction on the 3rd section of the *Factors' Act* of the 5 & 6 Vict. if I were to say, in that state of circumstances, that this deposit was made in respect of an antecedent debt from *Hodgson* to *Whitworth*. I think the whole case turns upon that; because, as regards Mr. *Baggallay's* argument on the general legal right which *Whitworth* and the *Clares* had acquired from their dealing without knowledge of the agency of *Hodgson*, that view seems to me to be excluded by the 2nd section of the 6 Geo. 4, c. 94.

I have looked into the case of *Navulshaw* v. *Brownrigg* (1), in which Lord *St. Leonards* discusses the statutes, and this seems plain—that the Act of Geo. 4 was passed to protect persons dealing with factors, not knowing them to be factors—and it provides, that if you are dealing with persons intrusted with bills of lading and other *indicia* of title, and you have no notice to the contrary, such persons shall and must be deemed to be full owners. But then the third clause enacts that, as regards security for an antecedent debt, you can only take the same degree of

(1) 2 D. M. & G. 441.

security as the person who transfers the bill of lading to you has, whether you know or do not know that he is not the owner. It appears to me, therefore, that that statute settled the position with reference to the legal title you might thus acquire without notice. If you took the goods without notice, you got only such interest as the person dealing with you had. In the present instance, *Hodgson* held the goods only as an agent, with certain limited authority.

Then the Act of the 5 & 6 Vict. c. 39, in the first section, says that even if you have notice of the agency of the person entrusted with the possession of the goods, he shall be deemed and taken to be the owner of such goods and documents, so as to give validity to any contract or agreement by way of pledge, if made *bonâ fide*. Then section 2 enacts that exchanges of goods with the agent, if made *bonâ fide*, shall be protected. That will apply to the case of the bill of lading of the *Priam;* and as to that, I have no doubt at all that there was a good charge upon the result of the realization of these policies of assurance, to the extent of the exchange made with the *Priam* cotton.

The third section of the Act is the only one that occasions any doubt. But I have already stated the reason why it appears to me that I ought not, under the peculiar circumstances of this case, to construe this transaction as a pledge given for an antecedent debt. There was no debt in reality until the cotton was paid for. *Hodgson* made the purchase, upon which *Whitworth* became liable; and *Whitworth* not finding it convenient to pay, goes to another person to make the advance. The advance and payment are made by the *Clares* on behalf of *Whitworth*. *Hodgson* is told that the *Clares* are pressing *Whitworth* for security with respect to the advances, and *Hodgson* hands over the bills of lading to *Whitworth*, with unlimited power of sale, for the purpose of making them available for getting the advances from the *Clares*. Through the agency of *Whitworth*, *Hodgson* delivers himself from these engagements; *Whitworth* not being called upon personally to make any payment, but the *Clares* advancing the money without the slightest knowledge of there being any agency in the transaction. There appears to have been perfect *bona fides* throughout. *Whitworth* seems not to have had the least suspicion that there was any duty or liability on the part of *Hodgson* towards his em-

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ployers; or that the cotton was the property of anybody but *Hodgson*.

I think I should be very much narrowing the effect of the statute, if I were to put the restrictive construction which has been contended for, upon the words "antecedent debt," by treating this pledge as made in respect of an antecedent debt of *Hodgson* to *Whitworth*, instead of being what it in reality was—a pledge in respect of an advance by the *Clares*.

The bill must be dismissed without costs as against *Hodgson*, and with costs as against the other Defendants.

Solicitors for the Plaintiffs: Messrs. *Clarke, Son, & Rawlins*, agents for Messrs. *Bateson, Robinson, & Morris, Liverpool*.

Solicitors for the Defendants: Messrs. *Hillyer & Fenwick*, agents for Messrs. *Littledale, Ridley, & Bardswell, Liverpool;* Messrs. *Flux & Argles*, agents for Messrs. *Harvey, Jevons, & Ryley, Liverpool;* Messrs. *Freshfields & Newman*.

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NUGENT *v.* VETZERA.

Jurisdiction—Foreign Tribunal—Infant—Guardian.

The Court will not from any supposed benefit to infant subjects of a foreign country, who have been sent to this country for the purposes of education, interfere with the discretion of the guardian who has been appointed by a foreign Court of competent jurisdiction, when he wishes to remove them from *England* in order to complete their education in their own country.

But the Court refused to discharge an order by which guardians had been appointed over the children in this country: and merely reserved to the foreign guardian the exclusive custody of the children, to which he was entitled by the order of the Court of his own country.

MOTION on behalf of the Defendant, *Albin Vetzera*, that an order appointing the Plaintiff Mrs. *Nugent* and her husband, and the Countess *Gifford*, as guardians of the infant Plaintiffs during their respective minorities, might be discharged, and that such guardians might be ordered to deliver up the infants, who were Austrian subjects, to the custody of Signor *Vetzera*, their guardian duly constituted by the Imperial and Royal (Austrian) Consular

Court at *Constantinople;* and also on behalf of the infant Defendants, that an order directing that Plaintiffs should be at liberty to serve the bill upon them out of the jurisdiction, might be discharged.

The facts were shortly as follows:—

The father of the infant Plaintiffs and Defendants, Signor *Theodore Baltazzi*, was a Greek by birth, but an Austrian subject, and carried on the business of a banker at *Constantinople* until his death in June, 1860. By his wife, who was an Englishwoman, and a member of the Church of *England*, he had ten children, all of whom survived him and were still under twenty-four, the age of majority according to the Austrian law. Signor *Baltazzi* died intestate, and administration of his estate, which was very considerable, was granted to his widow by the Austrian Consular Court at *Constantinople*, and she, and *Etienne Mavrocordato*, were also appointed by that tribunal guardians of the persons of the intestate's infant children.

Early in 1863 Madame *Baltazzi* contracted a second marriage with Mr. *Alison*, Her Brittanic Majesty's Envoy in *Persia*, and about the same time *Etienne Mavrocordato* resigned his office of guardian, upon which Signor *Albin Vetzera* (the Defendant now moving), the secretary to the Austrian Embassy at *Constantinople*, was appointed one of the guardians in his place. Upon the death of their mother, Mrs. *Alison*, in December, 1863, *Epaminondas de Baltazzi* was appointed guardian of the children in her place. In July, 1865, *Epaminondas de Baltazzi* resigned his office of guardian, partly (as it was alleged) from differences between himself and *Albin Vetzera* as to the management of the children and administration of the intestate's property, of which they were joint "curators" or trustees, but principally from his being unable to comply with the direction of the Consular Court ordering him to fix his residence at *Vienna* for the purpose of having the children educated there.

On the 24th of July, 1865, the resignation of *de Baltazzi* was accepted, and by a decree of the Austrian Consular Court of the same date, *Vetzera* was appointed sole guardian of the children, with a direction that they should be brought up in the religion of their father, and sent as soon as possible to *Vienna* "in order to receive their education in that city, the only mode of awakening and consolidating the sentiments of faithful Austrian subjects."

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It appeared that Madame *Baltazzi* was always most anxious that her children should receive an English education, and, with the consent of her husband, they were all brought up as members of the Church of *England*. Two of the girls were sent to school in *England* during his lifetime, and in 1861 the eldest boy was sent over to this country, and in 1862, after the marriage of the eldest daughter to Mr. *Nugent*, a gentleman living in *London*, two more boys and two of the girls were brought over from *Constantinople* to *England* under the care of Countess *Gifford*, and were now being educated in this country, spending their holidays with their married sister Mrs. *Nugent*.

The state of the family, and the ages and residences of the children at the time of filing the bill (December 1865) will appear from the following tabular statement:—

Residing in *England*.

Mrs. *Nugent*, the Plaintiff, who was married in 1862 to *Albert Llewellyn Nugent* (a nephew of Field Marshal Count *Nugent*)	23
Alexandre (now at *Eton*)	16
Hector (at *Rugby*)	15
Aristides (preparatory school at *Cheam*) . . .	14
Eveline and *Charlotte* (at Mrs. *Watson's* school in *Gloucester Crescent*, *Hyde Park*	12 and 11

Residing at *Constantinople*.

Helen (wife of Signor *Albin Vetzera*) . . .	19
Mary	17
Henry	8
Julia	5

After the resignation of *Epaminondas de Baltazzi*, Mrs. *Nugent* petitioned the Consular Court, but without success, for the appointment of herself as guardian over her infant brothers and sisters, and in the meantime *Vetzera* announced his intention of removing one of the boys and the two girls from *England*, and sent over a confidential female servant to take care of them during their journey to *Constantinople*. Mr. and Mrs. *Nugent* refused to let the children

go, and acting upon the circumstance that a portion of the intestate's estate (£160,000) was invested in consols and in *India* 5 per Cents., they had, on the 2nd of December, 1865, filed this bill for the purpose of making the infants wards of Court, securing the trust funds in this country for their benefit, and having guardians appointed, and a proper scheme for their maintenance settled by the Court.

On the 13th of December, 1865, an order was obtained for service of the bill upon the Defendants out of the jurisdiction, viz.: *Albin* and *Helen Vetzera*, the three infants, *Mary*, *Henry* and *Julia Baltazzi*, living with them at *Constantinople*, and Mr. *Gilbertson*, who was one of the trustees of Mrs. *Nugent's* marriage settlement.

On the 19th of December, 1865, an order was obtained appointing Mr. and Mrs. *Nugent* and the Countess *Gifford* guardians of the infant Plaintiffs, and giving liberty to serve a copy of the order upon the Defendant *Albin Vetzera* at *Constantinople*.

Against these orders the present motion was made on behalf of the Defendant *Albin Vetzera*.

In the meantime, on the 22nd of December, 1865, an order was made by the Austrian Consulate, on the petition of *Vetzera*, authorizing him to suspend all further payments of the allowance to the infants for the purpose of their education in *England*, until they should have been put under the control of their guardian, and also of Mrs. *Nugent's* allowance, until she should have ceased to interfere in the affairs of the guardianship.

Against this order, and that, by which her petition, that she might be appointed guardian, was refused, Mrs. *Nugent* had appealed to the Supreme Court of *Vienna*.

In his affidavit filed in support of the present motion, the Defendant *Vetzera* stated that he was dissatisfied with the progress made by *Eveline* and *Charlotte* with their schoolmistress, and also that he considered it to be his duty as guardian to obey the directions of the Austrian Consular Court, and remove the infants from *England*. For that purpose he had made arrangements that *Eveline* and *Charlotte* should reside with himself and his wife at *Constantinople*, and a competent governess for their education at his own house was already engaged. With regard to the boys, he proposed to place one of them (*Hector*) with a gentleman and his

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wife, of the highest respectability, residing in *Austria*, but stated that he had no present intention of removing *Alexandre* and *Aristides* from where they now where, though he considered it of the greatest importance that the boys "should have the advantage of an Austrian education, to qualify them hereafter for that position to which, from their rank and fortune, they would as Austrian subjects in *Austria* naturally aspire."

Evidence was also given as to the jurisdiction over infant Austrian subjects exercised by the Austrian Courts, and by them committed to the guardians.

The affidavits on behalf of the Plaintiffs, in favour of keeping the children in *England*, need not be stated in detail, as they were directed to the superiority of an English public school education, and English associations, over education at *Constantinople*, or even at *Vienna*. Attention was also called in the affidavits to the strongly expressed and acted upon wish of the mother that the children should be brought up in *England*.

Sir *R. Palmer*, Q.C., and Mr. *Cotton*, in support of the motion, contended that the Court would not, by reason of any preference for an English over a foreign course of education, supersede the foreign guardian, and the course of education directed by the Consular Court for these infants, who were Austrian subjects, unless there were strong special circumstances to induce the Court to depart from that respect for the decrees of a foreign Court of competent jurisdiction, which was established by the comity of nations and by international law. The domicil of these children was Austrian, as their father never lost his Austrian domicil, nor did their mother regain her English domicil of origin, and administration to his estate had been granted by the Austrian Consular Court, which had appointed *Vetzera* guardian, and given him express authority to remove the children from this country, and complete their education in *Austria*. The authority of the guardian thus legally constituted was not being in any way abused, nor was it necessary for any purposes of protection of the infants for this Court to interfere with the orders of the Consular Court. No doubt this Court would interfere with the right of the father to control the education of his children when he was about to bring

them up without any education at all, or in a manner prejudicial to their morals. But there was no pretence for saying that the Court would take a poor man's children from him, and hand them over to some one who would send them to a good school and give them a fortune. Superior education and increased means were no doubt benefits to infants; but the Court would not on that ground interfere with the natural right of the father, nor in the present case, in the absence of overwhelming necessity, with the right of the lawfully appointed guardian, armed with the authority of the Courts of the country of which these infants were subjects. The mere fact that a portion of the intestate's property had, after his death, been invested in the English funds, was no ground for this Court to assume jurisdiction over these infants.

Johnstone v. *Beattie* (1); *Potinger* v. *Wightman* (2); *Hope* v. *Hope* (3); *Stuart* v. *Marquis of Bute* (4); *Enohin* v. *Wylie* (5); and *Clavering* v. *Ellison* (6).

2. The suit was not instituted *bonâ fide* for the purpose of discussing any question of the rights of the parties to the stock invested in this country, but for the mere purpose of making foreign infants temporarily residing in this country wards of Court, and withdrawing them from the legitimate authority of their foreign guardian. It did not, therefore, fall within the provisions of 2 Will. 4, c. 33, or 4 & 5 Will. 4, c. 82, as a suit in which service may be ordered upon Defendants residing out of the jurisdiction; the jurisdiction given by these statutes being strictly confined to such suits as answer the description contained in them: *Cookney* v. *Anderson* (7). The order, therefore, by which service was ordered upon the Defendants, who were foreigners residing out of the jurisdiction, was irregular, and must be set aside: *Buchanan* v. *Rucker* (8).

Mr. *G. M. Giffard*, Q.C., and Mr. *Cecil Russell*, for the Plaintiffs, in opposition to the motion:—

The principle upon which the Court will interfere is thus summed up by Lord *Campbell* in *Stuart* v. *Marquis of Bute* (9): "The

(1) 10 Cl. & F. 42.
(2) 3 Mer. 67.
(3) 4 D. M. & G. 328, 344-6.
(4) 9 H. L. C. 440.
(5) 10 H. L. C. 1.
(6) 3 Drew. 651, 8 D. M. & G. 663.
(7) 1 D. J. & S. 365.
(8) 9 East, 192.
(9) 9 H. L. C. 463.

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benefit of the infant, which is the foundation of the jurisdiction, must be the test of its right exercise." Applying that principle to the present case, a case for the interference of the Court clearly arises.

With the consent of their father, in accordance with the earnest wish of their mother, an Englishwoman and a Protestant, these children have received an English education, have been brought up as members of the Church of *England*, and have acquired English habits and associations. It is not even suggested that they can receive as good, or even any, education in *Constantinople* —the evidence on this head is all one way; and as to completing their education at *Vienna*, what possible benefit can result by removing them from this country, where all their friends and connections are, and where they are being brought up under the care of a married sister, who, from her position in society, is able to give them the best possible education and associations, and sending them to a city where, even if a good education can be obtained, they have not a single relation or friend. We do not wish to remove *Vetzera* from his guardianship, nor do we suggest a single word against him. All we say is, that he is not an English guardian, and is unable, from his position, to bring these children up in accordance with the course of education that they have hitherto enjoyed. Let him co-operate with the English guardians, and allow these children to complete their education in this country; but, at all events, looking at what is most for their real interests, the Court will not hesitate to exercise its jurisdiction, and prevent their being removed from *England*, especially as the proceedings of the Consular Court are not final, but may be reversed at *Vienna*. With respect to service upon the infant Defendants abroad, *Cookney* v. *Anderson* (1) has no application. [They referred to *Hervey* v. *Fitzpatrick* (2), *Dawson* v. *Jay* (3), *Beattie* v. *Johnstone* (4).]

The VICE-CHANCELLOR, after stating the form of the order that he proposed to make, so as to reserve to the Defendant *Vetzera* his exclusive right to the custody and control of the infants, said that

(1) 1 D. J. & S. 365.
(2) Kay, 421.
(3) 3 D. M. & G. 764.
(4) 1 Ph. 17.

he did not at present feel disposed to discharge the order directing service upon the Defendants out of the jurisdiction.

Sir *R. Palmer*, in reply upon this point, contended that the *forum rei* must rule in cases of administration: *Enohin* v. *Wylie* (1); and that *Vetzera*, the administrator who was administering the estate under the direction of the Consular Court, was not properly made a Defendant to the suit in this Court, from the fact that a part of the estate was vested in the English funds.

The VICE-CHANCELLOR:—He has submitted to the jurisdiction.

Sir *R. Palmer*, Q.C.:—He has submitted to the jurisdiction in order that he may have a *locus standi* for this application; but not in the sense of admitting that he is competently sued in this Court. Both in *Cookney* v. *Anderson* (2), and in the case of the *Carron Company* (3), the Defendants appeared, and it was determined on demurrer that their appearance was not to decide the question whether the Court could ultimately assume jurisdiction over them. Here a suit is instituted against a person who is not subject to the jurisdiction either *ratione personæ* or *ratione rei*, as the estate is of a person domiciled abroad, has not been got in under any English administration, was not at the death of the intestate situate in this country, is being administered by a foreign Court, and only happens to be here under an order of that tribunal. Under these circumstances the Court has no authority to make the foreign administrator a Defendant, or, from his having been so improperly made a party, to draw in infants not within the jurisdiction, and appoint a guardian *ad litem* over them.

SIR W. PAGE WOOD, V.C.:—

As regards the more important matter in this case, a question of very great importance, but I think really of small difficulty, is raised. Having regard to the principles of international law, and the course that all Courts have taken of recognising the proceedings of the regularly constituted tribunals of all civilised commu-

(1) 10 H. L. C. 1. (2) 1 D. J. & S. 365.
(3) *Maclean* v. *Dawson*, 27 Beav. 25; 4 De G. & J. 150.

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nities, and especially of those in amicable connection with this country, it is impossible for me entirely to disregard the appointment of a guardian by an Austrian Court over these children, who are Austrian subjects, and children of an Austrian father, merely because those who preceded Signor *Vetzera* in his guardianship have taken the course of sending the children over to this country for the purpose of educating them, seeing that he is now desirous of revoking that arrangement. I am now asked in effect to set aside the order of the Austrian Court, and declare that this gentleman so appointed cannot recall his wards who have been sent to this country for the purpose of their education. It would be fraught with consequences of very serious difficulty, and contrary to all principles of right and justice, if this Court were to hold that when a parent or guardian (for a guardian stands exactly in the same position as a parent) in a foreign country avails himself of the opportunity for education afforded by this country, and sends his children over here, he must do it at the risk of never being able to recall them, because this Court might be of opinion that an English course of education is better than that adopted in the country to which they belong. I cannot conceive anything more startling than such a notion, which would involve on the other hand this result, that an English ward could not be sent to *France* for his holidays without the risk of his being kept there and educated in the Roman Catholic religion, with no power to the father or guardian to recall the child. Surely such a state of jurisprudence would put an end to all interchange of friendship between civilised communities. What I have before me is nothing more or less than that case.

Now, it appears to me plain, that I must take these children as remaining in this country only with the sanction of Signor *Vetzera*, and without any interference on the part of the Austrian Court. Then at a proper time he wishes to recall them from *England*. Of course if there had been no application to this Court no one can doubt the course which things would have taken. He being sole guardian, when he thought the children had been long enough at school in *England* would take them, if he thought fit, from this country and they would be removed.

[His Honour, after stating the filing of the bill and the appoint-

ment of guardians in *England* who wished to retain the children in this country, continued:—]

This application being made, it is now sought to prevent Signor *Vetzera* from removing the children so sent to this country for their education, on the plea that this Court has appointed guardians here in *England* (for which the jurisdiction is not to be disputed), and that having so appointed them, the Court will do no more than look at what is most for the benefit of the infants.

Lord Bute's Case (1) is cited for the purpose of shewing that I ought, if satisfied that it is more for the interest of the infants that they should remain here than be sent back to their own country, to supersede the authority of the foreign guardian and the authority of the Court that has appointed him, which takes care of the education of its own subjects, and directs how it shall be carried into effect. It appears to me that no doctrine of that kind was in any way propounded in *Lord Bute's Case*, and certainly the other authority referred to, of *Dawson* v. *Jay* (2) (called the American case), has no bearing upon the subject. Lord *Cranworth* there puts his decision on the ground that the child turned out to be a British subject, and that he had no authority to send a British subject out of the realm. In *Lord Bute's Case* the young marquis was a subject of the *United Kingdom*, and had very large property in *England* as well as in *Scotland*, and the question was, between the English and Scotch guardians, to which class the Crown, as *parens patriæ*, having full power to deal with the matter, should assign him. Can that be compared with a case in which the question is, whether I, sitting here as a Judge in this country, am to decide whether or not the Courts of the Emperor of *Austria* have rightly decided upon the mode in which they wish their subjects to be educated? The proposition is entirely beyond all reason, and this Court would be exceeding very largely the judicious exercise of the powers which every tribunal has in an independent country over those who may be within its control and jurisdiction, if it attempted to form a judgment whether or not it was more expedient that these children, who are Austrian subjects, should be brought up in *England* rather than in *Austria*. The case apparently nearest in principle, perhaps, though not, on examination, to be compared with it, is that in which

(1) 9 H. L. C. 440. (2) 3 D. M. & G. 764.

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a Roman Catholic parent abandoning his child to Protestant instruction for several years, has sought to change its course of education and bring it back to his own form of religion. There the Court would not allow the child's religious principles to be disturbed by changing the course of instruction under which it had so long been allowed to remain, holding that the father had, in effect, abandoned his right of choice. But that is not the case here. I see nothing on the facts to induce me to suppose that either this gentleman as guardian, or the Courts of *Austria*, in exercise of their rights over their own subjects, have at all abandoned these children, merely because they have allowed them to be educated for some four or five years in this country, where it was thought they could best be educated. To hold otherwise would render it most unwise for any foreign country to send her subjects to this country, as this Court might say that the Queen of *England*, as *parens patriæ*, can see to the education of children better than the Emperor of *Austria*, as *parens patriæ* within his own dominions, can. The same authority which we claim here on behalf of the Crown as *parens patriæ*, is claimed by every other independent state, and should not be interfered with except on some grounds which I do not think it necessary to specify, guarding myself, however, against anything like an abdication of the jurisdiction of this Court to appoint guardians. With respect to the English guardians of these children I hold that the Court has power to appoint them, and I continue those that have been appointed. The case may well happen of foreign children in this country without any one to look after or care for them, or who may require the protection of this Court to save them from being robbed and despoiled by those who ought to protect them. These children, on the other hand, seem to have met with nothing but kindness from their relations on all sides, but it may be desirable that, so long as they remain in this country, they should have the protection of guardians living within the jurisdiction. Out of respect to the authority of the Austrian Courts, by which this gentleman has been appointed, I reserve to him, in the order I am about to make, all such power and control as might have been exercised over these children in their own country if they were there, and had not been sent to *England* for a temporary purpose. Taking that view of the case I have not

asked to see the children. I could not be influenced by anything I might hear from them. I assume that they are most anxious to remain here, and not to go back to their own country, but I have no right to deprive the guardian appointed by the foreign Court over them of the control which he has lawfully and properly acquired, has never relinquished and never abandoned, and under which authority alone they have remained here, and been maintained and supported here.

As regards the service of the bill on those children who are out of the jurisdiction, I must take it on the present bill, as no demurrer has been filed, that the order has been properly made. It is alleged that all the debts, funeral, and testamentary expenses of the testator have been paid, that part of his property is invested in this country, and that by the law of *Austria* these funds are divisible in given shares among the Plaintiffs, and other children abroad who are interested in them, and therefore it has been thought right that they should be served with a copy of the bill, in order that they may come in in respect of their interest in the stock. I should be the more indisposed to disturb that order, as it is not asked to grant any proceeding against them, but that they should come in upon their common interest with the Plaintiffs. I think, therefore, as things stand on the present state of the record, that I am not at liberty to discharge that order, and it follows, as a mere matter of course, that I ought to appoint a guardian *ad litem* for the purpose of answering.

MINUTES :—Declare that the order appointing guardians in this country shall be without prejudice to the order of the Consular Court appointing Signor *Vetzera* guardian, and that *Vetzera*, as such guardian, shall have the exclusive right to the custody and control of the infants. Liberty to the Defendant to apply as to the removal of the children from this country or otherwise.

Motion to discharge the service abroad refused.

On the motion to appoint a guardian *ad litem*, the Defendant *Vetzera* appointed guardian *ad litem*.

Solicitors : Mr. *T. G. Kensit ;* Messrs. *Freshfields & Newman.*

V.-C. W
1866
July 27, 30.

In re JOHNSON'S TRUSTS.

Will—Settlement—Limitation of Personalty by reference to Realty—First Tenant in Tail—Absolute Interest.

Testator bequeathed freeholds to trustees and their heirs, to the use of his nephew for life, remainder to the use of his first son in tail male, with remainders over. He gave to the same trustees leaseholds, in trust for *such person or persons as should for the time being be entitled to the several freehold hereditaments* thereinbefore devised, to the end that the said leaseholds might go along with, and be held and enjoyed by the person or persons who, for the time being, should be entitled to the said freehold hereditaments, so far as the nature of the said leaseholds, and the rules of law and equity, would permit; but no person taking an estate tail by purchase in the freeholds was, for the purpose of transmission to representatives, to become absolutely entitled to the leaseholds until twenty-one. He devised to the same trustees and their heirs copyholds upon trust to permit and suffer the same *to be held and enjoyed by such person or persons as for the time being should become seised of or entitled unto any estate of freehold or inheritance* of and in the said freehold hereditaments for and during so long time as the rules of law and equity would permit. Power was reserved by the will to certain persons to cut timber; and the trusts of the timber money, when invested, were declared to be, to pay the income *to such person or persons as for the time being would be entitled to the rents and profits of the freehold hereditaments.* Testator further directed his trustees, out of his personalty, to set apart £10,000, and invest the remainder (after payment of his debts), and pay the dividends and interest thereof *from time to time as the same should become due and be received, unto such person or persons as for the time being should be entitled to the rents and profits of his freehold hereditaments* thereinbefore devised; and in case of failure of the issue of certain persons, upon trust to transfer what should remain of the said personal estate to a college:—

Held, that the personal estate vested absolutely in the first tenant in tail.

The Court will look to the general intention of a testator that the personal estate shall go with the realty, rather than to an apparent intention on his part to limit the personalty to an extent not permitted by law.

JOHN JOHNSON, rector of *Northchapel, Sussex*, by his will, dated the 18th of June, 1830, gave and devised his freehold lands and hereditaments to trustees and their heirs, to the use of his nephew, *Henry William Robinson Luttman Johnson*, and his assigns, for life, with remainder to the use of his first son, and the heirs male of the body of such first son, with divers remainders over; and an ultimate trust to sell the said hereditaments, and stand possessed

of the money to arise therefrom upon the trusts therein mentioned. The testator also gave to the said trustees, their executors, administrators, and assigns, certain leasehold estates in trust *for such person or persons as should for the time being,* by virtue of that his will, *be entitled to the several freehold hereditaments* and premises thereinbefore by him devised, given, or limited, as aforesaid, and for such or the like estates or interests as such person or persons should then have and be entitled to in the same freehold hereditaments and premises, to the end and intent that the said leasehold premises might go along with, and be held and enjoyed by, the person or persons *who for the time being should be entitled to the said freehold hereditaments* and premises, so far as the nature of the said leasehold premises, and the rules of law and equity, would permit; but so that no person taking an estate tail by purchase in the testator's said freehold estates should, for the purpose of transmission to representatives, become absolutely entitled to the said leasehold premises unless and until such person should attain the age of twenty-one years.

The testator further devised to the said trustees and their heirs, his customary or copyhold hereditaments, upon trust that they and the survivor of them, and the heirs and assigns of such survivor, should from time to time "permit and suffer the said customary or copyhold premises to be held and enjoyed *by such person or persons as for the time being should,* by virtue of that his will, or the limitations thereinbefore contained, respectively *become seised of or entitled unto any estate of freehold or inheritance* of and in the said freehold hereditaments and premises, for and during so long time as the rules of law and equity would permit."

In the will was contained a power for *H. W. R. L. Johnson* and *Clarentia Chichester* (a niece of the testator, entitled in remainder) respectively, as and when they should severally, by virtue of his said will, be entitled in possession to the freehold of the said hereditaments so devised as aforesaid (with the consent of his said trustees), and also for his said trustees, during the minority of any child of such survivor of his said nephew and niece, who for the time being should be entitled in possession to the said hereditaments, to sell the same (subject to the direction thereinafter contained respecting the money to arise from the sale of timber), and

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to lay out the money arising from such sale in the purchase of freehold hereditaments to be settled to the same uses. And he thereby authorized and directed his said trustees, and the survivors and survivor of them, and the heirs and assigns of such survivor, in the meantime, and until such estates or estate could be purchased, to invest the money so arising from the sale of timber in the purchase of consols, and to pay the dividends and interest thereof to *such person or persons as for the time being would be entitled to the rents and profits of the estates* when so purchased and enjoyed, but he expressly desired that the money should continue in stock no longer than should be necessary, and not by any means for the purpose of affording to the person or persons who might be entitled to the dividends a larger income than might be obtained from the rents of lands or hereditaments.

The testator further directed his executors, as soon as possible after his decease, to set apart out of the residue of his personal estate £10,000 in money to be held upon certain trusts; and then bequeathed as follows: "And upon further trust that they my said executors shall lay out the remainder of my said personal estate and effects (after paying my debts, legacies and funeral expenses, and setting apart the sum of £10,000 for the purposes aforesaid) in the purchase of £3 per cent. Consolidated Bank Annuities, and pay the dividends and interest thereof *from time to time as the same shall become due and be received, unto such person or persons as for the time being shall* by virtue of this my will *be entitled to the rents and profits of my freehold hereditaments* and premises hereinbefore by me devised, given, or limited, as aforesaid." He also directed that in case of the total failure of the issue of *H. W. R. L. Johnson*, and of *Clarentia Chichester*, his executors should pay certain further legacies, and should transfer what should remain of such £3 per cent. Consolidated Annuities, after the transfer thereinbefore directed should have been made, unto the President and Fellows of the College of *St. Mary Magdalen, Oxford*, to be by them held upon certain charitable trusts, therein specified, for the benefit of the college.

Testator died on the 4th of July, 1831.

Henry W. R. L. Johnson had issue ten children, of whom *John Luttman Johnson*, now of age, was the eldest.

The Petitioners, *Henry W. R. L. Johnson* and his first son *J. L. Johnson*, had applied to the trustees of the will to transfer to them the residuary personal estate, on the ground that the eldest son and first tenant in tail of the freeholds was absolutely entitled thereto, subject to the life estate of his father; but the trustees, on the ground of doubts whether the Petitioners were absolutely entitled, had transferred the fund into Court; whereupon this Petition was presented, praying that the fund might be transferred to the Petitioners.

Mr. *G. M. Giffard*, Q.C., and Mr. *George Williamson*, for the Petitioners, cited *Foley* v. *Burnell* (1); *Lord Scarsdale* v. *Curzon* (2).

Mr. *Cotton*, for the trustees.

Mr. *Willcock*, Q.C., and Mr. *Francis H. Law*, for the next of kin:—

The intention of the testator was to tie up the personalty in a succession of life estates. The words "from time to time as the same shall become due and be received," are very strong: *Hogg* v. *Jones* (3); *Lord Dungannon* v. *Smith* (4).

Mr. *Waller*, for the younger children of the first Petitioner.

Mr. *Giffard*, in reply.

July 30. SIR W. PAGE WOOD, V.C.:—

The question turns upon the construction of the will of Dr. *John Johnson*, who devised his freeholds, and created certain trusts respecting his copyhold and personal estates. The freeholds having been limited to the ordinary uses in favour of his nephew and his first and other sons in tail male, the leaseholds were limited in substance to go according to the limitations of the freehold estate, the copyholds were limited much in the same manner, and then the estate was dealt with in this way. The personal estate was

(1) 1 Bro. C. C. 274; S. C. 4 Bro. P. C. 319. (2) 1 J. & H. 40.
(3) 32 Beav. 45. (4) 12 Cl. & F. 546.

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directed to be all gathered together, and to be held upon trust, as soon as possible after the testator's death, out of the residue of the personal estate to raise the sum of £10,000 in money; and then the testator declares that his debts, legacies, and funeral expenses are to be paid, and the residue to be invested in consols; the dividends and interests to be paid as follows:—"from time to time as the same shall become due and payable unto such person or persons as for the time being shall by virtue of this my will be entitled to the rents and profits of my freehold hereditaments and premises hereinbefore devised." Then in case of failure of the issue of the persons named, the trustees are to pay certain legacies, and stand possessed of the remainder upon certain trusts for the benefit of the President and Fellows of *Magdalen College, Oxford.* Of course this ultimate limitation is void, being after an indefinite failure of issue, and I did not think it necessary to direct the petition to be served on the President and Fellows of the College.

Then the question is, what is to be done with the personal estate itself, whether it is to go to the same uses, that is to say, to the first tenant in tail, subject to the life estate of the tenant for life, it not being limited to him at twenty-one, or the like; or whether there has been an attempt on the part of the testator to create a perpetuity in the shape of an indefinite series of life estates.

I had occasion to examine all the authorities bearing on this subject in the case of *Lord Scarsdale* v. *Curzon* (1). In all these cases the Court looks not so much to a special intention of the testator to tie up property in a way which the law will not permit, as to the whole effect of the limitation. In dealing with personal estate, effect is rather given to the general intent, and although, in conformity with Sir *W. Blackstone's* argument in *Perrin* v. *Blake* (2), the words may seem to point to a limited intention of tying up property in a succession of takers, so that it cannot be disposed of, yet, where a general intention can be found that the property should go with the estate, there the personalty will follow the realty by vesting in the taker of the first estate of inheritance. That is, of course, unless the words point plainly to a succession of takers, in which case the gift will fail.

In this case, happily, the testator has not expressed any intention

(1) 1 J. & H. 40. (2) Harg. Tracts, 510.

to tie up the property in a way which the law will not permit. The words are all adapted to the carrying out of his general intention. The testator means the assets to go according to the limitation of the estate tail, and he means also that the personalty is not to go over until all the limitations are spent. In that event alone does he indicate any intention that the property is to pass through the successive takers of his real estate to a stranger. He does not in express terms limit the personalty to the several takers in succession. The trustees are to pay the dividends and interest from time to time as the same shall become due and be received, unto such person or persons as for the time being shall be entitled to the rents and profits of the real estate. Therefore he directs the dividends and interest of the personalty to go as freely as the rents and profits of the realty. The consequence is, that he gives an absolute interest in the personalty to the owner of the first vested estate in the inheritance. He does not advert to the state of the law, but it does not follow that on that account the Court will see an intention to violate the rule against perpetuities; it will rather see an intention to give the property to the owner of the first estate of inheritance.

The case, therefore, is entirely within the authority of *Foley* v. *Burnell* (1), where, by force of the word "heir-looms," the Court actually gave to the infant tenant in tail the immediate interest, the effect of which was to vest the property, upon the infant's death, in the father as his next of kin.

All parties will take their costs, and the trustee, his costs, charges, and expenses, properly incurred, out of the estate.

Solicitors for the Petitioners: Messrs. *Senior & Attree.*

Solicitors for the Respondents: Messrs. *Hill, Son, & Heald;* Messrs. *Cree & Law.*

(1) 1 Bro. C. C. 274; S. C. 4 Bro. P. C. 319.

V.-C. W.

1866

July 28.

LLOYD *v.* LLOYD.

Forfeiture—Bankruptcy—Annulment.

Gift by will of a share in residuary real and personal estate to *L.* for life; but if he should "by any act or default, or by operation of law, alien, charge, or dispose of the life interest, or in any manner anticipate the same to or in favour of any other person or persons," the gift to be void, and the share to go to the children of *L.*

At the death of the testatrix *L.* was a bankrupt, having been adjudicated a few days before on his own petition. Assignees were appointed; but no steps were taken to realize the assets, and within a twelvemonth the bankruptcy was, by an act of the creditors under their statutory powers, annulled:—

Held, that a forfeiture of the life estate, within the meaning of the clause in the will, had not taken place.

THIS was an adjourned summons.

Mary Ann Lloyd, widow, by her will, dated in 1865, bequeathed all the residue of her real estate, and all her residuary personalty, to trustees, upon trust as to four-fifths to pay and divide the same equally between four of her sons therein named, their executors or administrators. She directed her trustees to hold the remaining fifth upon trust to invest and pay the interest, dividends, and annual proceeds, to her son *Oliver Wimburn Lloyd* for his life. She then directed as follows:—

"Provided nevertheless that if my said son shall by any act or default, or by operation of law, alien, charge, or dispose of the same life interest, or in any manner anticipate the same to or in favour of any other person or persons, then the trust lastly hereinbefore contained in favour of my said son shall thenceforth be absolutely void, as if my said son were actually dead."

In the event of the gift becoming void, the share was given to the children of the said *O. W. Lloyd* equally.

The testatrix died on the 25th of July, 1865. At that date *O. W. Lloyd* was a bankrupt, having been adjudicated on the 11th of July preceding on his own petition. An official and a creditors' assignee had been appointed, but no steps were taken to

realize any part of the estate, and on the 24th of April, 1866, with the consent of the creditors under the 187th section of the *Bankruptcy Act*, 1861, the bankruptcy was annulled.

The bill was filed by the trustees, for administration, and the Chief Clerk having, by a special certificate, found that, "except as aforesaid," the said *O. W. Lloyd* had not by any act aliened, charged, or disposed of his life interest, *O. W. Lloyd* sought to have the certificate varied by striking out the above words :—

Mr. *G. M. Giffard*, Q.C., and Mr. *Nalder*, for *O. W. Lloyd* :—

In the events that have happened, *O. W. Lloyd* has not "aliened, charged, or disposed of," his life interest within the intent and meaning of the will : *Smallcombe* v. *Olivier* (1) ; *White* v. *Chitty* (2).

Mr. *F. H. Lascelles*, for the trustees.

Mr. *Daniel*, Q.C., and Mr. *Rasch*, for the children :—

One of the events contemplated by the testatrix has taken place, and the gift of the life interest is void.

The case is distinguishable from *White* v. *Chitty* (2). *O. W. Lloyd* was adjudicated on his own petition : he had consequently aliened by his own act. This is not an application by assignees in bankruptcy, and hence the argument does not apply, that a forfeiture of the gift will send the property in a channel other than that which the testatrix intended. In this instance a forfeiture would not defeat the testatrix's intention. In *White* v. *Chitty*, no assets could be realized, because, before the arrival of the quarter-day, and before any rents were receivable, the bankruptcy was annulled. That was not the case here.

[They referred to *Dorsett* v. *Dorsett* (3).]

SIR W. PAGE WOOD, V.C. :—

The true principle of construction of limitations of this kind in wills is, to see whether or not the actual event has occurred which the testator contemplated as that, upon the happening of which his property was to go over. Here the words are—

(1) 13 M. & W. 77. (2) Law Rep. 1 Eq. 372.
(3) 30 Beav. 256.

V.-C. W. 1866 LLOYD v. LLOYD.

"If my said son shall, by any act or default, or by operation of law, alien, charge, or dispose of the same life interest, or in any manner anticipate the same to or in favour of any other person or persons." Here the legatee, by his own act, has done the thing which caused an alienation. He himself petitioned for the adjudication under which he was made bankrupt. Then, under the 187th section of the *Bankruptcy Act*, 1861, the creditors agreed to an arrangement, and the whole proceeding was annulled. The question is, whether such an alienation of his interest can be considered to have taken effect, as to divest the legacy according to the true intention of the testatrix.

The reason why, in some cases to which I have been referred, the Court has rather strained the language, so as to occasion forfeiture, has been to prevent the property passing into hands other than those which the testator intended should receive it. In like manner, if the circumstances of the case admit, the Court will endeavour to interpret the language in favour of the legatee, for whom the testator has intended to make as extended a provision as he can.

The only doubt I have felt in this case has been, whether a dealing by third parties, after adjudication, can alter the terms imposed by the will, or vary the rights of the person who is the object of the gift over. On the whole I am inclined to look upon the annulment in the light in which it was viewed by the Court of Exchequer, in the case of *Smallcombe* v. *Olivier* (1), and consider, not that it relates back to the adjudication and annuls everything that has been done in the interval, but still that the whole proceeding may be looked upon as an adjudication followed by an annulment, which, though it operates only from the date of such annulment, yet was in time to intercept the property before it passed into other hands than those of the legatee.

The question being whether or not the legatee has, by any act or default, or by operation of law, aliened, charged, or disposed of his life interest, I find that, although there was an act of the bankrupt which *primâ façie* had that effect, yet that no one has interfered to realize the property, and that the bankruptcy has been intercepted by annulment of the adjudication.

(1) 13 M. & W. 77.

I must, therefore, hold that the income of the legatee has not been forfeited. V.-C. W. 1866 LLOYD v. LLOYD.

Solicitors for Mr. *O. W. Lloyd* and his children: Messrs. *Walters, Young & Walters.*

Solicitors for the Plaintiffs: Messrs. *Clutton & Ade.*

OTWAY-CAVE *v.* OTWAY.

V.-C. W. 1866 *July* 11, 13, 28

Settlement—Portions—Portioners becoming entitled to the Estate charged—Fund, how to be raised.

Where four portioners, entitled each to a fifth of a portions fund, became entitled in undivided shares to the estate upon which the portions fund was charged, the entire estate being also subject to a mortgage:—

Held, that no one of the portioners could claim the right of having the whole fund divided, and thrown in fourths upon the respective shares, in order that, by payment of the difference between what was chargeable on her share of the estate, and what was due to her in respect of the portion, her share of the estate might be cleared:

But *held* further, that such a proposal was a proper subject for arrangement in Chambers; and upon bill filed by a portioner under the above circumstances to have her share in the estate discharged, and to have the trusts of the portions term administered by the Court, leave was given to the Plaintiff to bring into Chambers a scheme for the purpose.

By a marriage settlement, dated the 19th of October, 1793, certain manors and hereditaments were conveyed in remainder, after the death of *Henry Otway* and *Sarah* his wife, to the use of trustees for a term of 500 years, and subject thereto, in strict settlement. The trusts of the term were, by and out of the rents, issues and profits of the hereditaments, or by mortgage and sale thereof, if there should be four or more younger children of the marriage, to raise £20,000 as portions.

By another indenture, dated the 15th of September, 1812, other estates were settled upon like trusts.

In 1799 the sum of £18,000 was raised by mortgage of the estates, under a power of mortgaging contained in the settlement.

Henry Otway, the father, died in September, 1815, leaving his wife surviving. The issue of the marriage were nine children,

V.-C. W. 1866 OTWAY-CAVE v. OTWAY.

of whom six were living at the husband's death, two sons, *Robert*, the eldest, and *Thomas*, and four daughters, *Maria*, *Anne*, *Catherine*, and *Henrietta*. *Thomas* died in 1830, without issue, and intestate.

In September, 1844, *Henrietta's* portion, amounting to £4000, was settled on the occasion of her marriage with the Rev. *Edgell Wyatt-Edgell*.

Robert died in November, 1844, without issue, and thereupon each of the four daughters became entitled to an undivided fourth in the hereditaments for an estate tail in remainder expectant on the death of their mother, *Sarah Otway*, then Baroness *Braye*.

In the year 1847 the share of *Anne* in the lands was, in contemplation of her marriage with *H. K. Richardson*, discharged from the estate tail, and put into settlement.

In 1850 the estate tail in the share of *Catherine* was, in contemplation of her marriage with Earl *Beauchamp*, barred, and the uses declared as she should by deed or will, notwithstanding coverture, appoint.

Lady *Braye* died on the 21st of July, 1862, and thereupon the estates in remainder in the four undivided shares in the lands fell into possession, charged with the mortgage debt, and (as a prior charge), with the £20,000 for portions; of which £16,000 was vested in the four co-owners of the estates, and £4000 belonged to the estate of *Thomas Otway* (subsequently *Otway-Cave*), who died in 1830, as above stated. This £4000 passed in sixths to his next of kin, of whom four were his sisters above-named, a fifth was his mother, who bequeathed her sixth to her four daughters, and the sixth was his brother *Robert*, whose share, amounting to £666 13*s.* 4*d.*, became vested in his representative, Mrs. *Money*.

It thus appeared that each fourth share in the land was chargeable with £5000, whilst each portioner was entitled to receive £4833 6*s.* 8*d.*; and all that was required to be raised was Mrs. *Money's* charge, amounting to £666 13*s.* 4*d.*

It was accordingly proposed, that on payment by the Honourable *Maria Otway-Cave* (who had barred her estate tail in the lands) and Lady *Beauchamp* (now a widow and *sui juris*) of £166 13*s.* 4*d.* each, and a share of the duties under *Thomas's* intestacy and Lady *Braye's* will, the trustees of the term of 500

years should assign to them their respective shares in the estates for the residue of the term, freed from the £20,000 charge.

It was also proposed (as Mrs. *Edgell's* portion was settled, and her estate tail not barred), that upon a like contribution being made by or on behalf of Mrs. *Edgell*, the trustees of the term should assign to the trustees of her settlement what was due to her in respect of the portions fund, and also assign to them, in order to secure the same, a fourth of the estate for the residue of the term, subject to the mortgage; or else that the whole of Mrs. *Edgell's* share of £4833 6*s.* 8*d.* should be raised at once by mortgage of her fourth (subject to the existing mortgage), and paid to the trustees of her settlement. A similar arrangement was proposed with regard to Mrs. *Richardson's* share and portion.

To this proposal the trustees of the married women's settlements objected, on the ground that if it were carried out, the portions, instead of being a first charge on the entirety of the estates, would be postponed to the mortgage; and that the first security would be released, and replaced by a second charge on a fourth of the estates only; and this bill was thereupon filed by *Maria Otway-Cave* against the executor of the surviving trustee of the term, her three sisters, and the husbands of the two who were still married, their trustees, and the mortgagee, claiming, upon payment of what should be found chargeable upon her fourth share in the lands in respect of the £20,000, to have the same fourth released and discharged of the term of 500 years, and praying that the trusts of the term might be carried into execution under the decree of the Court, and to have what should be found due in respect of the charge paid as the Court should direct.

Mr. *Rolt*, Q.C., and Mr. *W. Pearson*, for the Plaintiff:—

The Plaintiff is entitled upon payment of such aliquot part of the £20,000 as her undivided share in the lands is properly chargeable with, to have her share released from the trusts of the term of 500 years.

Only a small sum is immediately required; and it is desirable to avoid the expense of a mortgage, and the inconvenience of raising money for a number of persons who do not require it, out of their own property.

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OTWAY-CAVE v. OTWAY.

Mr. *Haynes*, for the Defendant the Rev. *Cooke Otway*, the executor of the surviving trustee of the term.

Mr. *W. M. James*, Q.C., and Mr. *C. Hall*, for Lady *Beauchamp*.

Mr. *Daniel*, Q.C., and Mr. *W. F. Robinson*, for Mr. and Mrs. *Edgell*, and their trustees:—

The trustees cannot agree to the proposal without the sanction of the Court. Mrs. *Edgell's* portion was put into settlement before she became entitled to any share in the lands. She is still tenant in tail of her share, but is willing to bar the entail, if the Court should direct.

[They referred to *Smith* v. *Frederick* (1)].

Mr. *H. F. Bristowe* for the mortgagee.

Mr. *G. M. Giffard*, Q.C., and Mr. *Kekewich*, for Mr. and Mrs. *Richardson*, and their trustees:—

It is an unusual proceeding to leave the £10,000 mortgage debt outstanding on the whole estate, and to apportion the other charges.

It does not follow that because £20,000 can be raised upon the entirety, therefore £5000 can be raised on each separate fourth.

Mr. *Rolt*, in reply:—

The security is ample for both charges.

No such point arises here as was decided in *Smith* v. *Frederick*.

July 13. SIR W. PAGE WOOD, V.C.:—

The point that arises in this case is very simple; the only difficulty is, as to the means of carrying into effect the arrangement that is desired.

It is clear, in the first place, that any person interested is entitled to have the whole of the £20,000 raised; and the mortgagee is a necessary and proper party, in order to see that the fund is properly raised.

It appears that, as to the Plaintiff and one of the Defendants, each of them is entitled to her share of the charge simply, and to

(1) 1 Russ. 174, 200, *n*.

her share of the estate simply; and each of them is *sui juris*. But the Plaintiff has not the absolute and neat right of a person who is entitled to an entire charge, and at the same time is entitled to a portion of the hereditaments which are subject to the charge. She has no clear abstract right to have the entire charge thrown in portions on the respective shares in the estate, instead of having it raised out of the entirety (which would of course be the most favourable mode of raising it,) simply because it suits her convenience to have her share of the estate cleared.

At the same time, it appears to me that this is a matter very proper to be arranged at Chambers, and I think the Plaintiff (as well as the Defendant who is in a similar position to herself), ought to have an option of bringing a scheme into Chambers, if she thinks fit, for advancing the money due from her in respect of her share of the estate, and having her share of the estate released, and then of applying to the Judge in Chambers to have the balance raised by a mortgage of the other shares. An opportunity should also be afforded to the Judge at Chambers of considering any suggestions that might be made, if any difficulties should arise (which, however, as the estate is large, are not likely to occur), with regard to the terms upon which the money is to be borrowed: as for instance, if the mortgagee should require a greater rate of interest, in consequence of his debt being secured upon a part, instead of upon the entirety of the estate.

Care also must be taken that no greater burden of costs is thrown on the other shares than would have been the case if the whole sum had been raised upon the entirety; and an adjustment with reference to that must be made in Chambers, because the costs may be greater in consequence of having to raise the other portions upon the undivided shares, instead of raising the whole £20,000 upon the whole estate.

July 28. The Minutes were this day settled in the following form:—

"Declare that the trusts of the term of 500 years created by the indenture of release and settlement, dated the 19th day of October, 1793, and by the indenture dated the 15th day of September, 1812, ought to be performed and

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carried into effect; and that, in the events which have happened, the sum of £20,000, and the costs charges and expenses of raising the same, ought to be raised in order to satisfy the portions of the five younger children of *Henry Otway* and *Sarah* his wife, by sale or mortgage of the hereditaments comprised in the said term, or a competent part thereof.

"Order that the costs of the Plaintiff and Defendants of this suit be taxed, the costs of the Defendant *Cooke Otway*, as between solicitor and client, including any charges and expenses properly incurred by him as trustee.

"Order that the Plaintiff and Defendants respectively be at liberty to lay before the Judge at Chambers such scheme or schemes as they may respectively think fit for raising the said sum of £20,000, and the costs, and the costs charges and expenses of raising the same, including the costs of this suit, by a sale or mortgage of the hereditaments comprised in the said term, or a competent part thereof.

"And if any of the parties to this suit, entitled to one-fourth part of the fee simple of the said hereditaments, subject to the said term, shall be willing either to pay one-fourth part of the said sum of £20,000, or otherwise to discharge such one-fourth part of the said hereditaments from such one-fourth part of the said charge, and also to pay such sum as the Judge in Chambers shall direct in respect of the costs, and costs charges and expenses, heretofore directed to be raised, order that the then remaining part or parts only of the said sum of £20,000, together with the remaining costs, and costs charges and expenses, be raised out of the remaining undivided fourth parts or shares, part or share, of the hereditaments comprised in the said term, as the case may be, as the Judge shall direct.

"Liberty to apply in Chambers as to the payment of the moneys to be raised, and of the costs, and costs charges and expenses, directed to be raised as aforesaid, out of the moneys when raised."

Solicitors for the Plaintiff: Messrs. *Skilbeck & Griffith*, agents for Messrs. *Miles, Gregory, & Bouskell, Leicester.*

Solicitors for the Defendants: Messrs. *Frere, Cholmeley, & Forster;* Messrs. *Freshfields & Newman;* Messrs. *Gregory & Rowcliffes;* Messrs. *James & Curtis;* Messrs. *Janson, Cobb, & Pearson.*

WILLIAMS *v.* BAILY.

V.-C. W.
1866
July 19.

Husband and Wife—Separation Deed—Proceedings in Divorce Court—Alimony—Injunction.

In a separation deed the husband covenanted with trustees to allow his wife £50 a-year for her support; he being indemnified against all debts and liabilities on her account, and it being agreed on her behalf that she would not in any way endeavour to compel the husband again to live with her, or to allow her "any further, or greater, or other support, maintenance, or alimony," than the annuity of £50:—

Held, that in the absence of any act shewing an unqualified acceptance by the wife of the provisions of the separation deed, or of any attempt to enforce it against her husband, the Court would not, upon interlocutory motion, restrain her from proceeding in the Divorce Court to obtain an allowance for alimony, as incident to her Petition for a judicial separation on the ground of cruelty, but the Court put her under an undertaking to deal with the alimony as this Court should direct.

MOTION on behalf of the Plaintiff for an injunction to restrain the prosecution of a suit for judicial separation commenced against the Plaintiff in the Divorce Court, and to restrain any other proceedings in that Court for compelling the Plaintiff to allow the Defendant, his wife, any further allowance for her maintenance or alimony than the annual sum of £50, pursuant to the provisions of a separation deed between himself and his wife.

The Plaintiff and his wife were married in May, 1857, but differences having arisen, a separation deed was, in 1865, executed between them at the instance of the wife (as the bill alleged). By this deed, which was made between the Plaintiff of the first part, his wife of the second part, and two trustees (also Defendants in this suit) of the third part, the Plaintiff covenanted that it should be lawful for his wife, notwithstanding their marriage, to live separate and apart from him, and that he would not endeavour to compel her to return to cohabitation by any suit or other proceedings, and would not interfere with her in any way. Mrs. *Williams* was to take for her own separate and absolute use, and notwithstanding her coverture, all such jewels, clothes, linen, wearing apparel, ornaments, articles, furniture, and things what-

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soever as then belonged, or were reputed to belong to her, or which she should at any time or times thereafter acquire.

Mr. *Williams* also covenanted with the trustees to pay Mrs. *Williams*, through their hands, an annuity of £50 towards her maintenance and support, on condition that he should be indemnified against all debts and liabilities on her behalf. It was also agreed, on behalf of Mrs. *Williams*, that she would not take any proceedings to compel her husband to cohabit or live with her, and that she would not "require, or by any means whatsoever endeavour to compel, the said *J. E. Williams* (the Plaintiff), to allow her any further, or greater, or other support, maintenance, or alimony, than the said clear annuity or yearly sum of £50."

The bill alleged that the Plaintiff had in all respects performed his part of the arrangement, and paid her the first quarterly payment of the annuity, which accrued due in the March of 1865 following the separation; but that, notwithstanding this, Mrs. *Williams* had, on the 9th of May, 1866, presented a Petition in the Divorce Court for judicial separation on the ground of cruelty. The Plaintiff, in his answer to the Petition for a judicial separation, denied the charges of cruelty, and insisted that the separation deed was a bar to the proceedings. This portion of the answer, however, was struck out by order of the Judge Ordinary.

On the 29th of May, Mrs. *Williams* presented a Petition in the Divorce Court for alimony *pendente lite*, so as to obtain an allowance greater than the £50 a year stipulated by the separation deed, and the Judge Ordinary, on the 19th of June, decided that, notwithstanding the separation deed, Mr. *Williams* must give particulars of his income, so that the Court might be in a position to award alimony *pendente lite*.

Under these circumstances the present bill was filed against Mrs. *Williams*, and the trustees of the separation deed, for the purpose of restraining the proceedings in the Divorce Court.

The case made by the affidavits, in opposition to the present motion, was, that Mrs. *Williams* was compelled, from his ill usage and personal violence, to leave her husband's house and go home to her father, and that, when a separation deed was agreed upon, she had consented to take £50 a year for her maintenance, under the impression, and acting upon advice, that she could not legally

obtain anything more, and that if she did not accept that sum she would have nothing, and must starve. It was also alleged that Mr. *Williams*, who was an artist, had an income of £1000 a year, and lived in a house in *Regent's Park*, "splendidly furnished," and kept a butler and several other servants. In an affidavit made in reply, Mr. *Williams* denied the allegations as to personal violence, and gave the amount of his average income at less than one-half the sum mentioned by Mrs. *Williams*. It was stated in the course of the argument, that the usual amount allowed by the Divorce Court for alimony *pendente lite*, was one-fifth of the husband's income.

Mr. *Rolt*, Q.C., and Mr. *T. A. Roberts*, in support of the motion, contended, that separation deeds, whatever doubts might have been thrown upon them by the earlier authorities, were now recognised as perfectly valid and mutually binding upon both husband and wife, who was put into the position of a *feme sole*, and, therefore, fully competent to bind herself by an agreement of this kind. It was alleged by the bill, and not disputed, that the husband had performed his part of the arrangement, and, in the absence of any attempt to set aside the deed, the wife, who had accepted the furniture and other chattels, and payment of the annuity, was equally bound by it, and could not be allowed, after receiving the benefits given to her by the deed, to turn round and repudiate the obligations by suing for this additional allowance in the shape of alimony, in the face of her own agreement to the contrary: *Savage* v. *Foster* (1); *Hill* v. *Turner* (2); *Hunt* v. *Hunt* (3); *Wilton* v. *Hill* (4); *Wilson* v. *Wilson* (5); *Nedby* v. *Nedby* (6).

The VICE-CHANCELLOR: There is no covenant in the separation deed that she will not sue for a judicial separation, so that the only question before me is, as to this application for alimony *pendente lite*.

Mr. *Willcock*, Q.C. (with whom was Mr. *Graham Hastings*), on behalf of the trustees of the deed of settlement and Mrs. *Williams*,

(1) 9 Mod. 35.
(2) 1 Atk. 515.
(3) 31 L. J. (Ch.) 161.
(4) 25 L. J. (Ch.) 156.
(5) 14 Sim. 405; 1 H. L. C. 538; 5 H. L. C. 40.
(6) 21 L. J. (Ch.) 446.

V.-C. W. 1866 WILLIAMS v. BAILY.

contended that she had been induced, without proper advice and assistance, and under pressure, to accept this pittance of £50 a year (which, considering her husband's position and means, was an utterly inadequate allowance), under the impression that if she did not take it she would get nothing at all. There had been no such acceptance by Mrs. *Williams* personally, whatever might have been the case on the part of her trustees, as to preclude her from applying, as incident to her petition for a judicial separation, for an increased allowance by way of alimony *pendente lite*. But in any case, the proceedings for alimony in the Divorce Court ought not to be interfered with, as the husband's means would be there inquired into, so as to obtain a basis for affording her a just and reasonable allowance.

He referred to *Boone* v. *Boone* (1756), mentioned by Lord *Romilly* in *Hunt* v. *Hunt* (1).

Mr. *Roberts*, in reply.

SIR W. PAGE WOOD, V.C.:—

18 L.J. 541

There can be no doubt that deeds of this description are perfectly valid, nor can there be any doubt that they can be enforced against the wife, who is not entitled to "approbate and reprobate," or, in other words, to accept the benefits and repudiate the obligations. I have myself gone further perhaps than had been done in any previous case in *Barrow* v. *Barrow* (2), where I bound the real estate of a married woman, on the ground that she was competent to elect, so as to affect her interest in real property, without a deed acknowledged for that purpose, and that having elected she must be held to her election.

I may also refer to *Bateman* v. *Ross* (3), as an authority that a married woman, being in litigation and at arm's length with her husband, can be bound by her own agreement to submit the matters in dispute between them to arbitration.

Here I should have no hesitation in holding the Defendant, Mrs. *Williams*, bound to the deed, and to all its provisions if she had sought to enforce it against her husband, or unequivocally asserted

(1) 31 L. J. (Ch.) 169. (2) 4 K. & J. 409.
(3) 1 Dow, 235.

her rights under it. But has there been anything of that kind made out? In the case of a simple separation deed, it must be made between the husband and trustees on behalf of the wife, and any breach of the agreement by the wife will be answered by her trustees. But, until she has undoubtedly and unqualifiedly compromised herself by some act of acceptance, her case stands on a different footing from that of the trustees. I can only look at the deed as it stands. Both husband and wife wish to part, and it is not alleged that the separation has arisen through any fault of hers. The deed does not contain any covenant not to take proceedings for a judicial separation on the ground of cruelty, and, therefore, I could not make any order as to any suit in the Divorce Court for that purpose.

The whole question, therefore, is reduced to that which arises upon the Petition for alimony. How far, then, has she acted upon the deed, so as to preclude herself from taking those proceedings? It is said that the husband has complied with all the provisions of the deed, and that she has accepted the benefits reserved to her, by taking the furniture, linen, and wearing apparel. But I do not think that this amounts to such an acceptance of the deed as will prevent her from disputing its provisions. Then with respect to the annuity of £50 a year upon a separation by mutual consent, a married woman would be entitled to some allowance for maintenance, and, looking at his position, the husband could hardly allow her less than £50 a year. I am not prepared, therefore, upon this interlocutory application, to say that there has been such an acceptance of the deed by this lady as to preclude her from disputing its provisions, or to induce me to grant an injunction against her proceedings in the Divorce Court for the purpose of obtaining alimony *pendente lite*. She must undertake to deal with any order the Divorce Court may make as to alimony as this Court shall direct, and upon this undertaking let the motion stand until the hearing of the cause, or further order.

Solicitors: Messrs. *Crossley & Burn;* Mr. *Bowen May.*

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1866
June 27.

16 Ir. 224.

WHITTER *v.* BREMRIDGE.

Will—Construction—Vesting—Maintenance.

Gift of residuary real and personal estate upon trust to sell and invest, and pay "the said property and interest arising therefrom to *A.*, on his attaining the age of twenty-four years; but in case of his not attaining that age, or leaving male issue, I give, devise, and bequeath the said properties" to other persons:—

Held, that *A.* took an absolute vested interest in the testator's residuary estate liable to be divested in the events mentioned in the will.

JOHN ROGERS WHITTER, by his will, dated the 3rd of January, 1856, gave all the residue of his estate and effects, both real and personal, to trustees, empowering them to sell, call in, and invest said property in government or freehold securities, as they might jointly consider advisable, and pay or cause to be paid "the said property and interest arising therefrom to my godson, *Arthur John Whitter*, on his attaining the age of twenty-four years; but in case of his not attaining that age, or leaving male issue, I give, devise, and bequeath the said properties in equal proportions to his father, *Thomas Arbuthnot Whitter*, the said *Tristram Whitter*, and *Walrond Whitter*, their heirs and assigns, for their absolute use and benefit respectively."

The question in the cause, which came on upon further consideration, was whether the infant legatee was entitled to an allowance by way of maintenance during his minority; in other words, whether the gift was of a vested interest, liable to be divested in certain events, or wholly contingent upon the legatee attaining twenty-four.

Mr. *Rolt*, Q.C., and Mr. *Cracknall*, for the infant Plaintiff, contended that he took a vested interest in the property, liable to be divested in the event of his not attaining twenty-four, or dying under that age without leaving male issue: *Phipps* v. *Ackers* (1); *Bull* v. *Pritchard* (2); *Snow* v. *Poulden* (3); *Packer* v. *Scott* (4).

(1) 9 Cl. & F. 583.
(2) 5 Hare, 567.
(3) 1 Keen, 186.
(4) 33 Beav. 511.

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Mr. *G. M. Giffard*, Q.C., and Mr. *Eddis*, for persons interested in remainder, contended that the interest of the Plaintiff was entirely contingent upon his attaining twenty-four: *Morgan* v. *Morgan* (1); *Knight* v. *Knight* (2).

Mr. *Peachey*, and Mr. *Begg*, for other parties.

SIR W. PAGE WOOD, V.C.:—

The case follows *Phipps* v. *Ackers* (3). There is no direction for accumlation, and while the first gift is of "the said property and interest arising therefrom," the property is given over *simpliciter*. The Plaintiff takes everything that is not given over, and as the interest is not given over, he is entitled to it. It will be sufficient for the decision of the point to declare that the infant is absolutely entitled to the testator's residuary estate under the trusts of his will, liable to be divested in the events in the will mentioned.

Solicitor: Mr. *Alfred Peachey*.

In re WEST SURREY TANNING COMPANY.

V.-C. W.
1866
June 30.

Company—Compulsory Winding-up—Preponderating Influence of a Shareholder.

Where a special resolution had been passed (but not confirmed) for the voluntary winding-up of a company, upon a Petition by a shareholder for a compulsory winding-up order, alleging that the company had been got up for the purpose of improving the property bought by the company, in order that the same might revert in its improved condition to the actual vendor, who held five times as many shares in the company as all the other shareholders together;

The Court, finding that there was a conflict between the parties, and that there were matters which required investigation, refused to give effect to the resolution of the company, on the ground of the preponderating influence of the single shareholder; and made the ordinary winding-up order.

THIS was a Petition by Colonel *Todd*, a shareholder, to wind up the *West Surrey Tanning Company, Limited*.

The company was incorporated in April, 1863, with the

(1) 4 De G. & Sm. 164. (2) 2 S. & S. 490. (3) 9 Cl. & F. 583.

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objects, as defined by its memorandum of association, of purchasing, taking on lease, or otherwise acquiring, a tannery and premises known as the "*Mill Lane Tannery*," at *Godalming, Surrey*, and the stock in trade and goodwill of the same, pursuant to an agreement dated the 9th of April, 1863, between *William Augustus Page*, of the one part, and *John Scott Cavell*, of the other part. The capital was to be £100,000, divided into 50,000 shares of £2 each. The articles provided that the directors should out of the first moneys that should come to their hands carry out the terms and stipulations of the above agreement.

After its incorporation the company issued a prospectus, in which the name of a Mr. *Francis Ignatius Vanzeller* appeared as one of the first directors, and the above-named Mr. *William Augustus Page* as manager; and it was stated that the property had been secured on very favourable terms: namely, that the vendor had consented to take shares to the amount of £6000 instead of cash, and that his services had been secured as manager.

The Petitioner applied for and had allotted to him 100 shares on the faith of Mr. *Vanzeller* (who was an acquaintance of his) being a director and a large shareholder. He afterwards himself became a director, and took further shares, to the number altogether of 1550, upon which he paid £812 10*s.* in all.

To *Page* there were allotted 10,620 shares, upon which £6000 was credited as having been paid; upon some of them 10*s.* only, and upon others 15*s.* only, being credited as having been paid up.

The Petitioner alleged that while he was director, Mr. *Vanzeller*, being also a director, applied to the board to forfeit or cancel a considerable number of the shares which stood in his name, upon which 10*s.* only had been paid up, on the ground that he had taken the shares from *Page* as a security for a debt, and that it was a hard case that he should have to pay calls. The Petitioner, amongst others, thinking the case a hard one, consented to the proposal, and 8010 shares were cancelled accordingly. He had since discovered that for two years prior to the incorporation *Vanzeller* had been the owner of the tannery, and *Page* his manager, at a fixed salary; that the company had been got up by *Vanzeller*, *Page*, and a third person, and that in order to conceal the fact that the works belonged to *Vanzeller*, it was stated that *Page* was the

owner, and the agreement contained a recital to that effect; also that the £6000 worth of shares were assigned to *Page* only as the nominee of *Vanzeller*, and that the cancelled shares were in fact *Vanzeller's* own.

The Petitioner also alleged that the company, for want of funds, had for twelve months and upwards been unable to carry on business; that the money contributed by the Petitioner and others had been laid out in permanent improvements; and that Mr. *Vanzeller* had purchased a large number of shares at nominal prices, by means whereof he was able to control any general meeting of the shareholders.

On the 7th of May last a special general meeting of the company was held, at which a resolution was passed for a voluntary winding-up, and a liquidator was appointed. The confirmation meeting, however, stood adjourned.

Under these circumstances the Petition was presented, the Petitioner alleging that the whole scheme of the transaction was to obtain money from the members of the company, and to invest the same in permanent improvements of the works, and then that the same should revert to Mr. *Vanzeller*.

Mr. *Vanzeller* (who opposed the application) by his affidavit said it was untrue that for two years previously to the incorporation of the company he had been the owner of the tannery, and that the £6000 worth of shares were allotted to *Page* as his nominee, or that the shares cancelled were in fact his (deponent's) shares. He said that *Page* was the lessee of the tannery and the goodwill, and that the sale was *bonâ fide* by *Page*, and deponent was in no way interested. He admitted, however, that *Page* was indebted to him in the sum of £2000 and upwards, and that *Page* had transferred to him the shares as security for his debt. Deponent paid calls on fifty of the shares, but not on the remainder, and he made the above-mentioned application to the directors for the reasons stated. The tannery belonged to a Mrs. *Lee*, subject to the lease to *Page*, and she sold it to the company for £3150, of which £650 was paid in cash, and it was agreed that the remaining £2500 should remain charged on the property. The stock was purchased at a valuation for £3543 6s. The only interest deponent ever had in the tannery previous to the sale

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was, that by arrangement between himself and *Page*, the business of the tannery was for two years previously to the sale carried on at deponent's expense, and for his benefit, by *Page*, at a salary of £300 per annum. Deponent had no interest in the tannery itself, or in the goodwill of the business. Deponent said the company owed him £2500 for advances, and he was by far the largest creditor; the other creditors were not fourteen in number, and their collected debts amounted to about £1200.

The shareholders of the company were ten in number. Of these Mr. *Vanzeller* held 10,475 shares; the Petitioner 1300; Mr. *Vanzeller* and the Petitioner, as trustees for the company, 550; *Mangles Brothers*, 300; *B. L. Phillips*, 100; *W. R. Dawson*, 50; *J. S. Cavell*, 10; *G. Derbyshire*, 10; Miss *Homan*, 5; and *E. L. Bennett*, 5.

Mr. *Cottrell*, for the Petitioner:—

Owing to the preponderating influence of Mr. *Vanzeller* (whose nominee *Dawson* was), resolutions passed at a meeting of shareholders became a mere farce. *Cavell* was the secretary of the company, and *Bennett* was his clerk.

Mr. *Dickinson*, for Mr. *Vanzeller*, and all the other shareholders, except the Petitioner and Miss *Homan*:—

If the case made by this Petition were true, the proper remedy of the Petitioner would be by bill in equity. The rule of the Court is, to give effect to the wishes of a majority of the shareholders.

Sir W. Page Wood, V.C.:—

This is a case in which, there being a conflict between the parties, it appearing that there are matters to be investigated, it is manifest that there is an overwhelming influence on the part of a single director.

Mr. *Vanzeller*, in his affidavit, says he was not the owner of the concern. But he admits that he was the creditor of *Page*. He says "*Page* was the manager of the business; he was the owner of the goodwill and of the leasehold interest which was sold to the company; but he was my debtor." Apparently *Page* gave no other security to Mr. *Vanzeller* for his debt than these shares.

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[His Honour reviewed the list of shareholders, and after observing that only one shareholder, Miss *Homan*, remained neutral, continued:—]

The Petitioner is no doubt the holder of 1300 shares, but he is, and would be, even if he had all the other shareholders with him, so utterly overborne by the single influence of Mr. *Vanzeller*, that he is not in a position to contradict or control anything which Mr. *Vanzeller* might say was proper to be done.

Under these circumstances, I think this is a case in which the common order for a compulsory winding-up ought to be made.

Solicitors for the Petitioners: Messrs. *Nokes, Carlisle, & Francis.*
Solicitors for the Respondents: Messrs. *Uptons, Johnson, & Upton.*

V.-C. W.
1866
July 5.

In re RUSSIAN (VYKSOUNSKY) IRONWORKS COMPANY.

WEBSTER'S CASE.

Company—Rectification of Register—Variance between Prospectus and Memorandum.

A. was induced by the statements contained in the prospectus to apply, in April, 1865, for shares in a company, and in answer to his application received a letter of allotment. *A.* made the further payment required by the prospectus, and in June, 1865, received in exchange for the banker's receipt a certificate that he was the proprietor of fifteen shares in the company, "subject to the provisions of the memorandum and articles of association, and to the rules and regulations of the said company."

The objects of the company as stated in the memorandum and articles of association were more extensive than those stated in the prospectus.

A. never attended any meeting of shareholders, and did not see the memorandum or articles of association until May, 1866:—

Held, that he was entitled to have his name removed from the register, as the terms of the certificate did not amount to notice that he had entered into a new contract, or that the objects of the memorandum and articles were more extensive than those of the prospectus on the faith of which he applied for shares.

THIS was an application on behalf of Mr. *Webster*, a shareholder in the *Russian* (*Vyksounsky*) *Ironworks Company, Limited*, that his name might be removed from the list of shareholders

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of the company, and the register rectified in that respect. Mr. *Webster* applied for fifty shares in the company in April, 1865, after seeing the prospectus, which was circulated before the articles of the association were registered, and paid £50 to the bankers of the company, agreeing by his letter of application, "to accept such shares or any less number as you may allot to me, and I agree to pay the sum of £4 per share on allotment, and I authorize you to insert my name on the register of members for the number of shares allotted to me." On a subsequent day Mr. *Webster* received a letter of allotment for fifteen shares, upon which the further sum of £25 was paid by him, making up the full amount of £5 per share required by the prospectus. The bankers' receipts were subsequently exchanged for a certificate of shares, which was as follows:—

"*The Russian (Vyksounsky) Ironworks Company, Limited.* Capital, £500,000. In 25,000 shares of £20 each. First issue, 15,000 shares. This is to certify that *Robert Webster* of *Swenton House, Swenton, Nottingham,* corn-merchant, is a proprietor of fifteen shares, of £20 each (10,536—10,550 inclusive), in *The Russian (Vyksounsky) Ironworks Company, Limited,* subject to the provisions of the memorandum and articles of association, and to the rules and regulations of the said company, and that up to this day there has been paid up in respect of each of such shares the sum of £5. Given under the common seal of the said company, 20th June, 1865."

Mr. *Webster,* who lived near *Nottingham,* never attended any meeting of the company, and never saw the memorandum or articles of association, or heard of their contents, until the end of last May, when the affairs of the company were subjected to investigation by a committee of shareholders.

The application, as in *Stewart's Case* (1), was based upon the wide discrepancy between the scope and objects of the company, as stated in the prospectus, on the faith of which the shares were taken, and in the memorandum and articles of association subsequently registered.

Mr. *G. M. Giffard,* Q.C., and Mr. *J. N. Higgins,* in support of

(1) Law Rep. 1 Ch. 574.

the motion, relied upon the decision in *Stewart's Case*, and submitted that as to notice and acquiescence this case was even more favourably circumstanced for removing the name from the list of shareholders, as Mr. *Stewart* knew in September, 1865, that there were articles of association, and that they contained a clause considered objectionable by the committee of the *Stock Exchange*. To hold that the mere reference in the share certificate affected Mr. *Webster* with notice that the memorandum and articles of association differed materially from the prospectus, would be carrying the doctrine of constructive notice further than it had ever yet been carried.

They cited *Ex parte The Marquis of Abercorn* (1); *Ex parte Briggs* (2).

Mr. *Rolt*, Q.C., Mr. *Druce*, and Mr. *Waller*, for the company:—

The question in no way turns upon constructive notice. Mr. *Webster* agreed to take his shares, not subject to such articles and such memorandum as ought to be framed having regard to the prospectus, but subject to the actual articles and memorandum then in existence. There was a binding contract, and Mr. *Webster* could not be allowed to disregard the articles, which he did not seek to set aside or annul on the grounds of surprise and mistake, or fraud on the part of the directors. Looking at the consequences to creditors, the Court will hesitate before striking off the list this gentleman, who expressly contracted to take his shares subject to the memorandum and articles of association, and now seeks to escape from liability by having it declared that he took his shares, not subject to the memorandum and articles, but subject to some other provisions not mentioned therein. The case is distinguished from that of Mr. *Stewart* by the circumstance that there the full amount was paid, and everything completed on his part before the shares were allotted. Here the contract was inchoate, and was not completed until the second payment, when the certificate dated the 20th June was delivered. Whatever might have been the form and object of the original application, the shares were received with this superadded term imposed, viz: that he received them subject to the provisions of the memorandum and articles of asso-

(1) 10 W. R. 548. (2) Law Rep. 1 Eq. 483.

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ciation which were at that time registered; and if he had any doubt as to what the superadded terms by which he was to abide were, it was his business to have satisfied himself on the subject. Suppose the case were that of an ordinary contract for the purchase of a freehold estate, and the vendor wrote to the intending purchaser offering to sell the property free from any liability; and that subsequently a formal contract, in which there was specific notice of some liability, was executed by both parties, in which the original terms were distinctly modified, could the purchaser after acting upon the contract, and lying by for twelve months, come to this Court to be relieved from it?

[The Vice-Chancellor:—The answer is, that he signs something with express notice of an express liability. The question here is, whether in accepting subject to the provisions of some contract which he has not seen, he is not justified in supposing it to be the thing which he originally contracted to buy.]

The same principle must apply to a contract to take shares in a company, and to a contract to purchase a freehold estate, and unless a purchaser comes promptly to be relieved from a contract, his application will not be entertained.

Sir W. Page Wood, V.C.:—

I am very glad to hear that *Stewart's Case* is under appeal, and I am desirous that this case should go with it, but subject to any possible difference of principle as regards the interests of creditors, it strikes me that the case is really quite plain and simple. It is not the case of a man agreeing to accept on one set of terms, and completing the purchase on other terms, but it is this (as appeared to me in *Stewart's Case*), that the prospectus which was issued differed materially from the deed which was executed; the objects of the deed being much larger both in area and in time than those of the prospectus. Take the case of a company announcing by its prospectus that its business would consist of insurance against fire, and then by its deed of settlement including life assurance. *A. B.* seeing the prospectus applies for shares, and pays up a portion of the sum necessary to be paid upon allotment, and thus

gives the directors authority to insert his name as a shareholder in a company for insurance against fire. The directors having procured a deed to be prepared, which provides for life assurance, take the rest of *A. B.*'s money, and send him a document, telling him that he is the holder of shares in the company subject to the provisions of the memorandum and articles of association, and to the rules and regulations of the said company. Is this fair notice that he has thereupon entered into a new contract, and that the deed contains something totally beyond anything that he ever intended to subscribe to? Taking it simply as a case of ordinary vendor and purchaser, it seems to me that the Court would have no hesitation in saying that it was a gross fraud. I do not wish to apply that word in the least offensively to these gentlemen, because it seems to me to have been entirely an error of judgment, but with the same result to the purchaser as if it had been done purposely. It is like the case of a man who agrees to purchase or take on lease certain property of which the conveyance is to be prepared by the vendor's solicitor, paying his money and taking a receipt, and then finds that the deed as prepared is of another property. The purchaser would of course assume that the property comprised in the deed was the same that he agreed to purchase, and the Court would not hold that there was any contract to purchase any other property. No doubt questions as to the rights of creditors may arise in these companies, and that point was pressed upon me in *Ship's Case* (1), which I understand is being carried to the highest authority. My decision was affirmed by the Lords Justices, and to that argument they answered—and I prefer their answer to any of mine—that the creditors trust the company, and not the members of the company individually, and that after all they really know the provisions of the statute, by which any one improperly put upon the register can apply to have his name taken off, and therefore no credit they may have given to the company can entitle them to say that a man improperly placed upon the register can be kept there.

I cannot therefore distinguish this case on the ground of this gentleman having taken a certificate which tells him he is the holder of shares, subject to a deed which he knew would be pre-

(1) 13 W. R. 451, 599; 2 D. J. & S. 544.

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pared to carry into effect the company to which he intended to belong. Why should he imagine that that instrument would have different objects from the objects of the company to which he had given his adhesion? Under these circumstances I am bound to strike off his name.

Mr. *Giffard*:—There will be the same order as in the other case, with costs?

The VICE-CHANCELLOR:—Yes.

Solicitors: Messrs. *Harrison & Lewis;* Messrs. *Newbon, Evans, & Co.*

V.-C. W. 1866 *July* 7.

GILL *v.* BAGSHAW.

Will—Legacy—Uncertainty in Object of Gift—Blanks in Will.

Devise and bequest of real and personal estate in trust for all the testator's nephews and nieces, the sons and daughters of his sister *R.*, including who the illegitimate of the said *R.*, equally as tenants in common:—

Held, a good devise to the legitimate sons and daughters of *R.*, exclusive of *R.'s* illegitimate children.

THIS was an adjourned summons to vary the Chief Clerk's certificate.

The question arose on the construction of a clause in a will dated in November, 1832, whereby the testator, *Joseph Warhurst*, gave his residuary real and personal estate to trustees upon trust for his daughter *Ede* for life, and afterwards for her children. He then directed that in the event (which happened) of his daughter dying without leaving lawful issue, the whole of his real and personal estate was to go and be in trust as follows: "For all and every my nephews and nieces, the sons and daughters of my sister, *Rebecca Mason*, including who the illegitimate of the said *Rebecca Mason*, equally to be divided between and amongst them, share and share alike, as tenants in common, and their, his or her heirs, executors, administrators, and assigns."

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The testator died on the 16th of March, 1833.

In 1807, *Rebecca Mason* had married *Thomas Mason*, by whom she had had three illegitimate children. She had two children after her marriage, and died in 1857.

A bill by the illegitimate children, claiming to be entitled to three-fifths under the above clause, was, in 1859, dismissed by the Master of the Rolls: *Mason* v. *Bateson* (1).

Testator's daughter was now dead; and this suit was instituted by the trustee and executor of the surviving trustee of the will, against Mrs. *Bagshaw*, the eldest legitimate child of *Rebecca Mason*, seeking the direction of the Court in the disposal of the trust funds. The Chief Clerk had found the legitimate children entitled, and the summons to vary was taken out by *Horatio J. Webster*, the widower and administrator (or person entitled to administration) of the daughter and sole next of kin of the testator, who contended that the whole bequest was void for uncertainty.

Mr. *Rolt*, Q.C., and Mr. *E. R. Turner*, for *Horatio J. Webster*:—

The whole bequest is void for uncertainty. No doubt there is a clear gift to the sons and daughters of *Rebecca*, unless that gift is cut down by the subsequent clause. The blanks cannot be disregarded; and it may be admitted that the last blank must be filled up either with the word "child" or "children." If that be so, an intention is shewn to benefit some of the illegitimate children of *Rebecca*, whom the testator should afterwards select; but as he never exercised the power of selection, all the children of *Rebecca* are excluded on the principle of *Brown* v. *Higgs* (2).

In order to the validity of a gift by will, there must be certainty of object, certainty of subject, and certainty as to the specific portion of the share given: *In re Brown's Trusts* (3); *Jones* d. *Henry* v. *Hancock* (4); *Jarman* on Wills (5). The omission shews that the testator had not made up his mind whether he should insert the name of one child, or the names of more than one, and if of more, whether of two or three more. The case thus becomes the direct converse of *Illingworth* v. *Cooke* (6), where there was a gift to a

(1) 26 Beav. 404.
(2) 4 Ves. 708, 719.
(3) 1 K. & J. 522.
(4) 4 Dow, 145.
(5) 3rd ed. vol. i. p. 332.
(6) 9 Hare, 37.

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class, with the exception of one person, whose name was left in blank, and never filled in. In *Jerningham* v. *Herbert* (1), a testatrix gave such of her jewels as should at her death be deposited with Messrs. *R.* to *A.*, and the rest to *B.* At her death there were no jewels deposited with Messrs. *R.*, and Sir *J. Leach* held the whole gift void. In *Boyce* v. *Boyce* (2), where there was a gift to *M.* of such one of certain houses as *M.* should choose, and the rest to *C.*, *M.* dying before the testator, and any choice by her being impossible, the gift to *C.* was held by the Vice-Chancellor of *England* to have failed. In *Greig* v. *Martin* (3), where there was a gift to "my nephews and nieces *John P.* and *Nanny P.*," followed by a long blank, Vice-Chancellor *Stuart* held the gift to be void for uncertainty.

Further, a gift to children as a class, which gift as to some of the class is void for *remoteness*, is void as to all: *Routledge* v. *Dorril* (4). The rule is the same where the gift as to some is void for uncertainty.

The Master of the Rolls in the former suit decided the point in our favour: *Mason* v. *Bateson* (5).

Mr. *W. M. James*, Q.C., and Mr. *C. Hall*, for the Plaintiff.

Mr. *Amphlett*, Q.C., and Mr. *Owen*, for the Defendant Mrs. *Bagshaw*:—

All the Master of the Rolls decided was, that the gift to the illegitimate children was void for uncertainty. He did not decide that the gift to the lawful children was void.

Mr. *A. E. Miller*, for persons in the same interest.

Mr. *C. C. Barber*, for an incumbrancer.

SIR W. PAGE WOOD, V.C.:—

It seems to me, that the only possible view of this gift is, that the testator never made up his mind whether he should insert any names into these blanks or not, and so never filled them up. It

(1) 4 Russ. 388.
(2) 16 Sim. 476.
(3) 5 Jur. (N. S.) 329.
(4) 2 Ves. 357, 366.
(5) 28 L. J. (N.S.) 391, 392.

is much the same as if he had said, "including any persons whom I may hereafter name by a codicil," and then had never made a codicil. It was in fact an inchoate intention, which he never accomplished.

Then, why should not the wording of the original gift remain exactly as it was? It is as if the testator had struck out the subsequent clause, and left the original devisees in sole possession of the property.

To decide the case on the authority of *Illingworth* v. *Cooke* (1), would be, I think, to put too narrow a construction on the language. In that instance, the testator gave the property to the whole of a class, excepting one, whom he omitted to name, and accordingly it was held that he had excepted nobody.

The case of *Greig* v. *Martin* (2), before Vice-Chancellor *Stuart*, is clearly distinguishable. In that case there was no one to answer the description of "my nephews and nieces," for the testator only named one nephew and one niece, and left a long blank. Here he meditates a gift to a certain class, definitely, and then he contemplates doing something which he never accomplished.

The nearest decision to this is that of *Jerningham* v. *Herbert* (3), the principle of which seems to have been this: The testatrix meant to say, "When I shall have done something, my gift will take effect; but until I do that thing, there is to be no gift." She never did the thing contemplated, and, consequently, it was held, there never was any gift at all.

Here, it seems to me, the gift to the sons and daughters of *Rebecca* is complete. The testator may have deliberated as to whom he should include besides, but in the result he included nobody else. Therefore, he must be held to have left the whole to those upon whom he originally bestowed the property.

The motion to vary the certificate must be refused.

Solicitors for the moving parties: Messrs. *Gregory & Rowcliffes.*

Solicitors for other parties: Messrs. *Few & Co.*; Messrs. *Duncan & Murton.*

(1) 9 Hare, 37 (2) 5 Jur. (N. S.) 329.
(3) 4 Russ. 388, 390.

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1866

July 6.

RASHDALL *v.* FORD.

Railway Company—Borrowing Powers—Lloyd's Bond—Misrepresentation of Law—Bill against Directors.

Plaintiff alleged, that being desirous of advancing money on debentures, he applied to a secretary of a railway company, who wrote, offering him a bond of the company for £1500, and stating that the company were not yet in a position to issue permanent debentures; but that they expected to be able to do so in four or five months' time. With the letter was sent a prospectus, from which it appeared that the company was incorporated by Act of Parliament, and that three persons named were directors. Plaintiff advanced the money, and received in return a *Lloyd's* bond, signed by the secretary, whereby the company purported to acknowledge the debt, and to covenant to pay the same with interest at 6 per cent.

The company having ceased to pay interest, and being in difficulties, Plaintiff filed a bill against two of the three directors, and the representatives of the third, praying that they might be decreed to pay the amount advanced by the Plaintiff with interest:—

Held, that the principle of relief on the ground of misrepresentation by third persons did not extend to an incorrect statement of a matter of law and demurrer by the representatives of the third director allowed.

THIS was a demurrer.

The bill was filed by the Rev. *John Rashdall* against *Robert Ford*, *Frederick William Sedgwick*, and the legal personal representatives of the late *Thomas Winkworth*, alleging that in 1863 the Plaintiff, being desirous of investing some money in railway debentures, applied to *Humphrey Williams Wood*, who wrote offering him a bond for £1500 of the *Waterford and Passage Railway Company*, of which *Wood* was secretary. In this letter Mr. *Wood* stated: "We are not exactly yet in a position to issue the permanent debentures, but we expect to be able to do so in four or five months; meantime, we issue legally common bonds, in the form which I send, same to be exchanged for the regular debentures some few months hence." With the letter was enclosed a prospectus, from which it appeared that the capital of the company consisted of £60,000 in 6000 shares, and that the directors were, Sir *R. J. Paul*, *E. Roberts*, *R. Ford*, *T. Winkworth*, and *F. W. Sedgwick*

The bill alleged that the Plaintiff accepted the offer, "believing that the security proposed was in all respects legal and valid."

On the 14th of April he paid £1500 into the company's bankers, and received in exchange a bond, commonly called a *Lloyd's* bond, dated the 8th of April 1863, signed by *Wood* as secretary, whereby the company acknowledged the debt for money due and owing, and covenanted to pay interest at 6 per cent. A memorandum was endorsed, to the effect that the bond was to be exchanged (when the company was in a legal position to do so) for a debenture at three years' date, bearing interest at 6 per cent.

In April, 1864, the Plaintiff received a year's interest, but no more interest was paid, and in November, 1865, he was told that the company could not pay its way; whereupon he consulted his solicitor, who advised him that the so-called bond "was not binding upon the company, and was, in fact, wholly void."

The bill alleged that the grounds upon which the Plaintiff's solicitor arrived at this conclusion were, that by the Act incorporating the company, it was enacted that the company might borrow on mortgage any sum not exceeding in the whole £20,000; but that no part of such sum should be borrowed until the whole of the capital of £60,000 should have been subscribed for, and one-half actually paid, and that the conditions thereby imposed on the company in reference to borrowing money had not been complied with—the facts being, that the whole of the £60,000 had not been subscribed for, nor one-half of the capital paid up.

In reply to a letter to the directors by the Plaintiff's solicitor, threatening a bill in Chancery against them personally, Mr. *Wood* said he might mention, to save inquiries or trouble, that Sir *R. Paul* was not elected a director, that Mr. *Roberts* was only named an *ex-officio* director, that the directors who formed the board at the time were Messrs. *Ford*, *Winkworth*, and *Sedgwick*, and that they were advised that the issue of the bond was legal.

The bill made no allegation of fraud, or misrepresentation of fact, but charged that, under the circumstances, the Defendants,

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R. Ford, F. W. Sedgwick, and the representatives of *T. Winkworth,* out of his assets, ought to be decreed to pay to the Plaintiff £1500, and interest at the rate aforesaid, from the 8th of April, 1864, and prayed accordingly.

To this bill the representatives of *T. Winkworth* demurred for want of equity.

Mr. *G. M. Giffard,* Q.C., and Mr. *Jackson,* for the demurrer:—

The bill is not founded on any recognised ground of equity. It simply states a contract; it contains no allegation of fraud, misrepresentation of fact, or misapplication of money. It is not even stated that any of the directors knew anything about the transaction.

Mr. *Rolt,* Q.C., and Mr. *C. C. Barber,* for the bill:—

The bill is filed against the directors, there being no remedy in a case of this kind against the company. The bond is clearly void at law against the corporate body: *Chambers* v. *Manchester and Milford Railway Company* (1).

The company cannot lawfully borrow except upon the terms of their special Act. If they borrow upon other terms, they are liable to penalties under the 7 & 8 Vict. c. 85, s. 19. All that a *Lloyd's* bond amounts to is an account stated and a promise under seal to pay the amount.

Upon this bill it appears that representations were made by the Defendants through their secretary to us, which they did not know to be true, which were not true, and upon which they induced us to act. Whether such misrepresentations were innocently made or not, the Defendants are bound to make them good: *Slim* v. *Croucher* (2).

If individual corporators borrow money and order works in excess of their powers, they will be personally liable for the work done, although the contract was made in the name of the company: *Wilson* v. *Goodman* (3); *Higgins* v. *Livingstone* (4).

It is quite clear that this paper writing is void for all purposes;

(1) 5 B. & S. 588. (3) 4 Hare, 54, 62.
(2) 1 D. F. & J. 518. (4) 4 Dow, 341.

but the circumstance of the directors using it amounts to a representation that it was a valid bond when issued.

In *Parrot* v. *Eyre* (1), the Defendant, a turnpike road trustee, was held liable to the Plaintiff, who had advanced £2000, but had not received the security of the tolls which he stipulated for.

In *Burrowes* v. *Lock* (2), a trustee was charged in respect of misrepresentations to a purchaser who had had notice, but alleged that he did not recollect the fact.

Mr. *Giffard*, in reply :—

It is going a long way to say that a company cannot borrow money by means of *Lloyd's* bonds. The only mode in which a contractor can possibly be secured is by taking an instrument upon which he can bring an action, recover judgment, and seize the company's property. If it be held that a company may by contracting incur a liability, surely, in some shape or other, that company can borrow money to pay their liabilities. Then is a creditor to be in a worse position than a contractor?

It is not denied that in this case there is no remedy against the company; and the question is, are the Defendants liable? Was the representation such as to make them liable? Representations made by the secretary of a company beyond the limits of his duty as secretary, would amount to nothing: *Pasley* v. *Freeman* (3). A distinction is to be drawn between representations of matters of fact and of matters of law. The secretary did not undertake the duty of advising the Plaintiff professionally. The Plaintiff must be taken to have been quite as well advised as the directors, or as the company.

The cases that have been cited were those of trustees, who being known to have certain powers, overstepped the limits of their powers, or exercised them irregularly.

If the directors can be held to be under any liability, it must be a joint and not a several liability, and these Defendants are free. But it is submitted that the Plaintiff contracted with his eyes open; that he must be taken to have known the law; and that

(1) 10 Bing. 283. (2) 10 Ves. 470.

(3) 3 T. R. 51.

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having got the very thing for which he contracted, he cannot now be heard to complain of his bargain.

SIR W. PAGE WOOD, V.C.:—

This bill seeks to make the Defendants stand in the place of the company with which the Plaintiff supposed he was contracting, on the well-known principle that where, by the representations of a third person, a man is led into a contract which proves to be injurious to him, or from which he reaps no fruit, he is entitled to have those representations made good.

The Plaintiff's case is that he contracted with a railway company who were incapable of contracting. He says, "The secretary represented to me that they were capable of contracting, and therefore I hold them to be actual contractors." Now if there had been any misrepresentation of a matter of fact in this case, the result would have been undoubted; as, for example, if the company having power to issue debentures to a certain amount, and having exhausted that power, the directors had stated that they still had power to issue debentures, they would then have stood in the position of being obliged to make good their representations. Assuming for the purpose of the demurrer that the letters of *Wood*, the secretary, are brought home to the directors, the case comes to this:—*Wood* says, "We are not yet in a position to issue the permanent debentures, but meantime we issue legally common bonds in the form which I send." But this statement is as much against the lender as against the borrowing company. There is no attempt to allege fraud, or any misleading of an ignorant man. The case is that of two persons of equal knowledge and intelligence. They meet and make a bargain. The Plaintiff alleges a misrepresentation of a matter of law, and that under that state of circumstances, he advanced money to people who were unable to borrow from him—a case extremely analogous to that of a payment made by a man in alleged ignorance of the law. It seems to me impossible to extend the principle of relief arising out of misrepresentation, to a statement of law which turns out to be an incorrect statement. The Plaintiff must be taken to have been well informed of the state of the law as laid down in

Chambers v. *Manchester and Milford Railway Company* (1), just as much before as after the date of that decision. The Plaintiff advances his money and takes his security. It does not follow that the Defendants are bound to make good the money in consequence of the law having been incorrectly stated.

But it is said that the contract was with the company, and that the money has passed into their hands. Whether this gentleman could recover against them in an action for moneys had and received I know not; but it is impossible to say that the directors are more than agents, or that they can be held personally liable for any statements as to the legal effect of a security which they agreed to give, and which the Plaintiff agreed to take.

The case of *Wilson* v. *Goodman* (2), before Vice-Chancellor *Wigram* was totally different. There certain persons contracted that certain works should be done, and they were held liable under their contract, unless exempted by Act of Parliament. The Court held that they were not exempted, and hence that they were liable. But that case has no bearing on the present, which is simply this—how far directors who have received money, advanced by a gentleman on the faith of a representation of a matter of law by a third person, which turns out to be incorrect, are liable to make good that misrepresentation, they not being the Plaintiff's fiduciary advisers.

The demurrer must be allowed.

Solicitor for the Plaintiff: Mr. *Saffery Wm. Johnson.*
Solicitor for the Defendant: Mr. *H. Gregory.*

(1) 5 B. & S. 588; decided June 24, 1864. (2) 4 Hare, 54.

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NEWALL *v.* THE TELEGRAPH CONSTRUCTION COMPANY.

Practice—Production of Documents—Affidavit—Concise Statement—Further Affidavit—Answer—Exceptions.

10QBD 194
203.

When a Defendant, after answer, has obtained an affidavit as to documents in the common form, if he finds that the inquiry in the common form is not sufficiently pointed to enable him to obtain discovery as to specific matters, his proper course is to file a concise statement of the specific matters with respect to which he seeks discovery, with interrogatories, which it will be the duty of the Plaintiff to answer fully; and it will be no answer to the Defendant to say that some of the matters given in the specific statement were comprised in, or that they were all referred to in the answer, and that the first affidavit was sufficient.

A Defendant having filed a concise statement, with interrogatories, under the above circumstances, is not entitled, before the answer has come in, to take out a further summons for an affidavit of documents in the same special form as that in which he has interrogated; and such a summons will be dismissed as unnecessary.

THIS bill was filed on the 30th of June, 1865, by *Robert Stirling Newall*, wire rope and submarine telegraph manufacturer, for an injunction to restrain the *Telegraph Construction Company, Limited*, from causing or permitting the *Great Eastern* and the *Caroline*, or any other steamer or vessel, to leave any port or harbour in the *United Kingdom* whilst fitted or furnished with, or having on board, the apparatus which the Defendants had caused to be fitted or placed in the *Great Eastern* and the *Caroline* respectively, as in the bill mentioned, or any part of such apparatus, or any apparatus made or constructed, fitted or arranged according to the Plaintiff's patent, or on the same principle, or only colourably differing therefrom, for laying down the *Atlantic* telegraph cable, or any submarine electric telegraph cable, without the license of the Plaintiff; and for other subsidiary relief.

The Defendants filed an answer on the 16th of December, and on the 11th of January, 1866, they obtained an order in the usual form for the Plaintiff to make an affidavit as to documents in his possession or power relating to the matters in question in the cause; and the Plaintiff, in pursuance thereof, filed an affidavit on

the 30th of January, to the sufficiency of which the Defendants did not except.

On the 9th of March the Defendants filed a concise statement, in which they stated as follows:—The Plaintiff had, before the 14th of May, 1855, the date of his provisional specification, publicly used the so-called invention, by putting apparatus constructed according to it, at *Gateshead* on board the ship *Black Sea*, and at *London* on board the ship *Argus*, and had actually coiled by means of such apparatus the cable then intended to be laid down, and afterwards laid down by him from *Varna* to *Balaclava*, and thence to *Eupatoria*, in the *Black Sea* . . . . A permanent core had been publicly used before the date of the letters-patent in various processes which involved the coiling and discharge of a long rope, as, for instance, in *Thorold's* improvement of *Manby's* apparatus; and had also been publicly used before that date in the manufacture of electric cables. In the latter process, a core on a revolving turn-table had been commonly employed; but in one case (that of the manufacture of the *Holyhead* and *Howth* cable in 1854, by Messrs. *Fenton & Co.*), the cable, while in the course of manufacture, had been coiled in a brick tank, round a brick cylindrical centre. In numerous instances (of which the *Persian*, employed in 1854 to lay down the *Sardinia* and *Spezzia* cable, was one) an electric cable, when coiled on board ship, had been supported from without by upright timbers . . . . The arrangements for coiling and delivering the cable used on board the *Caroline* were precisely similar to those used in 1857 by Mr. *Henley*, a telegraph cable manufacturer at *Woolwich*. . . . .

The statement did not expressly say that the Plaintiff was in possession of documents relating to these several matters, but it was accompanied by interrogatories, which concluded with the following special inquiries:—

"16. Has not the Plaintiff now, or had he not formerly, and when last, in his possession, custody, or power, or in the custody, possession, or power of his attorneys, solicitors, or agents, attorney, solicitor, or agent, divers or some and what books or book, plans or plan, drawings or drawing, specifications or specification, contracts or contract, agreements or agreement, letters or letter, copies of or

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copy of letters or a letter, journals or a journal, memorandums or memorandum, documents or document, papers or paper, writings or writing, in some way relating or referring to some and which of the several submarine electric cables heretofore laid down by him, and especially that laid down by him between *Varna* and *Balaclava*, and thence to *Eupatoria*, or to the apparatus to be used for coiling, or stowing, or laying down, or delivering some and which of the said cables, or referring to or mentioning the apparatus or process used by any other and what persons, and especially the said Mr. *Henley*, and when and where, in coiling or stowing, or laying down or delivering, or paying out submarine cables generally, or some and what other submarine cables, or some other and what long cables or ropes from ships into the sea, or otherwise, or referring to or mentioning the mode of coiling or stowing the rope used in *Thorold's* improvement of *Manby's* apparatus, or the mode of coiling or keeping electric cables in the process of manufacture, or mentioning or referring to any, and what, experiments made by the Plaintiff, or any other, and what, person as to coiling or stowing, or delivering or paying out cables, or any apparatus or process adopted by any one, and whom, and where, for any of the above-mentioned purposes, or referring to or mentioning the provisional specifications filed by the Plaintiff in the bill mentioned, or connected with or referring to the preparation of it, or connected with or referring to the contents of such provisional specifications, or any and what part thereof, or the omission from, or insertion in, such provisional specifications, of any and what matters connected with or referring to the contents of the Plaintiff's letters-patent in the bill mentioned, or any and what part thereof, or the omission or insertion in such letters-patent of any and what matters connected with, mentioning, referring, or alluding to, or bearing directly or indirectly upon, the matters and things in these interrogatories mentioned and inquired after; and especially the said Mr. *Henley's* proceedings, and the Plaintiff's mode of treating them, or any one and which of them, or whereby, or by means whereof, the correctness or incorrectness of the matters mentioned in the concise statement prefixed to these interrogatories, or any or one or which of them, would or might appear.

"17. Let the Plaintiff set forth a full, true, and perfect list or

schedule, of all the several particulars inquired after in the last preceding interrogatory, distinguishing those now, from those not now, in such possession, custody, or power as aforesaid, and state what has become of such of them which once were, but are not now, in such custody, possession, or power as aforesaid; and why, when, and to whom, and under what circumstances, each of those was parted with, or ceased to be in such possession or power as aforesaid; and how far, and in what respect, they or it would have been material or relevant to the questions asked by these interrogatories, or any or either of them."

On the 9th of April, before the Plaintiff's answer had come in, the Defendants took out a summons for an affidavit of documents in almost exactly similar terms to the above interrogatory. This summons was heard in Chambers on the 20th of April, and was then ordered to stand over until the Plaintiff's answer was filed, which was done on the 7th of May.

The 16th paragraph of the Plaintiff's answer was as follows:—

"The documents mentioned in the said affidavit are still in my possession or power. No objection has been taken by or on behalf of the said Defendants to the sufficiency of the said affidavit. I am advised and believe that I am not liable, according to the practice of this Honourable Court, to be cross-examined on my said affidavit, but that if I can be required to answer the 16th interrogatory to the said concise statement, it will be practically and in effect a cross-examination on my said affidavit. If, however, upon a proper application being made for that purpose, the said affidavit should be held to be insufficient, I submit to make a further affidavit when required to do so, according to the practice of this Honourable Court."

On the 6th of June exceptions were filed by the Defendants to the Plaintiff's answer for insufficiency, for that he had not made full, true, and perfect answer to the above interrogatories.

The Defendants' summons and exceptions to answer now came on to be heard together.

Mr. *Rolt*, Q.C., and Mr. *Wickens*, for the Defendants:—

According to the old practice, where a bill had been filed, if the

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Defendant filed a cross bill for discovery, and the Plaintiff answered, and the Defendant thought the discovery founded upon that answer insufficient, he was at liberty to amend his bill, and require a further answer.

According to the new practice, the Defendant instead of filing a cross bill, files a concise statement; and it is submitted, that by taking out a fresh summons for production of documents, he is simply doing, under the new practice, what he was formerly at liberty to do under the old, when he amended his cross-bill for discovery. It cannot be that the privileges conferred by the old practice are wholly swept away by the new.

In this instance the Plaintiff does not pretend to say he has answered the interrogatory. He says that by putting in his affidavit he has closed our mouths for ever. According to the decision of Vice-Chancellor *Kindersley* in *Piffard* v. *Beeby* (1), if a Plaintiff files a bill and puts the ordinary interrogatory as to documents, the Defendant may decline to answer. But how stands the case if the bill be amended? A number of new facts may be introduced, and in that case it was very reasonably held under the old practice, that the Plaintiff was entitled to a further answer; and under the new practice, if a Plaintiff amends his bill and introduces new matters he is entitled to a further affidavit of documents as to the amendments: *Warden* v. *Peddington* (2).

Under the old practice there was very considerable hardship, because a Defendant could not obtain discovery, except at his own expense. The costs of a cross bill for discovery were made costs in the cause. This was not only the most valuable part of the discovery, but it was an infallible guide as to what the Defendant would want for his defence.

If this form of proceeding fails, Defendants must always hereafter have recourse to the old practice, and file a cross bill for discovery, and amend, as formerly.

The *Attorney-General* (Sir *H. M. Cairns*), and Mr. *Speed*, for the Plaintiff:—

The Plaintiff's affidavit of the 30th of January, was admitted to

(1) Law Rep. 1 Eq. 623. (2) 32 Beav. 639.

be sufficient. The concise statement is only a recapitulation of the Defendant's answer.

A Defendant was and is at liberty to get a further answer to an amended cross bill, on a charge of the Plaintiff's being in possession of some further specified documents. The concise statement here makes no such charge. The former affidavit is therefore sufficient.

It was decided by the Lords Justices in *Manby* v. *Bewicke* (1), that this is an affidavit upon which a Defendant cannot be cross-examined. If this practice be allowed, that rule will be virtually superseded, and there will be no case in which a party to a suit may not be cross-examined on his affidavit as to documents. The summons founded on the concise statement puts precisely the same questions as would be asked in cross-examination.

But further, if there were (as it is submitted there is not) ground for the application, this interrogatory is impertinent and vexatious. One of the cables named was laid down with apparatus for which the Plaintiff obtained his patent in the same year. What has that to do with the matters in the cause? The inquiry extends to all the cables Mr. *Newall* has laid down in the course of his life.

The VICE-CHANCELLOR said he thought the proper course would be to allow the exceptions to the answer, but called upon the Defendants to say what was to be done with the summons.

Mr. *Wickens*, in reply:—

The summons was taken out in the first instance with reference to the decision in *Piffard* v. *Beeby*, which seemed to decide that a summons was the proper mode of obtaining the discovery sought. The Defendants were anxious to be right *quâcunque viâ*. If it had been possible to bring on the summons before the time for answering had expired, it is probable that the Court would have been troubled with only one application. But from some cause or other it stood over, and there was a risk that the time for answering would expire. The double course was taken,

(1) 8 D. M. & G. 470.

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because in the then state of the practice the Defendants were not sure they were safe.

SIR W. PAGE WOOD, V.C.:—

The question does not come upon me at all by surprise; it involves a point which I have often had to consider, though I have never, till now, been called upon to give a decision upon it.

A good deal of difficulty has arisen, no doubt, with reference to the practice of having an affidavit as to documents in Chambers in a general form. That form, however, as far as my Chambers are concerned, was settled by a very high authority, the then Vice-Chancellor *Turner*, after much consideration, and I have been very loth to depart from it. The best proof of its value is, that for all ordinary purposes it has been found perfectly efficient. In cases where a reasonably fair answer has been put in, there never has been found to be any difficulty. The form must necessarily be somewhat general; and it is impossible to import into a general mode of expression the particulars of each individual case. Accordingly, every now and then it must happen that the form is not quite sufficiently pointed; and when the person who requires the affidavit does not obtain what he considers a fair and satisfactory answer, believing that there must be documents in the Defendant's possession to which his recollection has not been called, or that the Defendant has taken rather too wide a view in his own favour as to what may or may not be pertinent to the case, there is a way in which that difficulty has been got over, in most instances successfully.

In the case of *Manby* v. *Bewicke* I decided, and the Lords Justices (1) affirmed the decision, that there could be no cross-examination upon the affidavit, and no second affidavit to contradict the first.

But I have frequently found this course very effective. If there is another class of documents to which it is supposed attention has not been paid, let that fact be stated; and then if, as more frequently happens where there has been further examination, it is supposed there are others, let the particular thing on which

(1) 8 D. M. & G. 470.

information is required be stated, and then a further affidavit must be put in, or, if refused, such refusal is at the peril of the person who now knows to what his attention is directed. I have generally found that quite sufficient to bring out any particular statement that is wanted as to any particular document; but in some cases it has failed.

In this instance the Defendant obtains from the Plaintiff an affidavit, which does not, as he thinks, go sufficiently into those particulars which he wishes to have inquired into. He wants an answer as to documents of a particular character, and he takes two courses. First, he takes out a summons, desiring that a further affidavit may be made comprising these particular documents. It is clear to my mind that he cannot succeed in that, because there is not any technical failure of the first affidavit. The first affidavit is perfect, and I cannot require any further affidavit to be made with all those additional particulars. But secondly, he files a concise statement, giving a number of facts, which may possibly be in the answer; and it may be true that the Plaintiff, having put in his affidavit in the form prescribed, after answer, and having stated that he knows nothing in reference to the matter in dispute, may in a sense be said to have answered as to everything in the bill and answer. It may be said for him by way of argument, as it has been said to-day:—the affidavit has answered the concise statement by anticipation, because the concise statement contains nothing but what is in the answer; and I say that the documents do not relate to the matters in issue. But to that the Defendant rejoins:—"That may be so; but under the old practice, if I filed a cross bill, I had a right to interrogate specifically upon the cross bill." Accordingly the Defendant in his concise statement specifies certain particular things, some of which may or may not be in the answer, but I think it is immaterial whether they are or not. Amongst other things he makes particular statements respecting prior user at *Gateshead*, on board a ship called the *Black Sea*, and at *London* on board the ship *Argus*, and with respect to the cable laid down from *Varna* to *Balaclava*. Those are specific statements, which I believe are also made in the answer, and inquiry is directed to them. He also speaks of a permanent core having been publicly used before the date of the letters-patent,

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of the manufacture of the *Holyhead* and *Howth* cable in 1854, by Messrs. *Fenton & Co.*, and of the discharge of a long rope in *Thorold's* improvement of *Manby's* apparatus; then he specifies other instances in the laying of the *Sardinia* and *Spezzia* cable, and so on. It is true that the concise statement does not contain a charge that the Plaintiff has in his possession documents relating to these matters; but I cannot hold that the interrogatory is invalid, because there are not half-a-dozen words more in the concise statement. I think the interrogatory is quite as good without these specific charges.

Then it is said that the interrogatories as to discovery are in a very wide form, and are very inconvenient to deal with. That is no doubt the case; but I do not think they are in a form which cannot be easily dealt with by a person skilled in answering. The interrogatory, for example, goes to specific discovery of documents relating to the cable that was laid down between *Varna* and *Balaclava;* and this, I think, the Defendants are entitled to have, more especially when, as I am told, what was done before the obtaining of the letters patent may be a question of some nicety at the hearing. I think I cannot say it was unreasonable that the Defendants should require all the documents respecting that matter, relating to anterior publication, or to the apparatus for coiling, or stowing, or laying down, or delivering cables, or referring to or mentioning the apparatus of Mr. *Henley*, who is specified in the concise statement; and so of other specified matters. Even before the decision in the case of *Piffard* v. *Beeby* (1), I should have objected strongly to exceptions for insufficiency of answer as to documents simply, where I found, as I do in so many cases, the charge in the bill as to documents exactly the same as the form which has been settled in Chambers, and where no object could possibly be attained by having exceptions taken as well as by filing interrogatories. But where, as in this case, the difficulty which I have foreseen has arisen, and specific information is wanted of papers relating to particular matters, it does appear to me that the only mode of getting at it is this, which has been adopted in the present case.

On behalf of the Plaintiff it has been argued, that it is not right

(1) Law Rep. 1 Eq. 623.

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that a rival manufacturer should see the contracts into which the Plaintiff has entered, and so on. All that, I shall be quite prepared to deal with, as I have dealt with it before in cases of a similar kind. Let him seal up the names of persons with whom he has contracts, the prices, and the like, which have no bearing whatever on the question of anterior publication. But as regards the observation as to the wideness of the inquiry as to what other people have done, that is the very issue and gist of the case. The Defendants are not asking the Plaintiff what all other people have done, but what documents he himself possesses informing him of what other people have done, and describing to him that process.

With regard to the costs, it seems to me that a double expenditure ought not to be incurred. On the one hand, the Defendants were wrong in incurring the double expense; and on the other hand, the Plaintiff is wrong on the point of the exceptions. I will give an option to both parties to say whether the costs shall be costs in the cause. If I am to decide it, I shall give no costs upon this matter to either side; but if both parties agree, let them be costs in the cause.

Solicitor for the Plaintiff: Mr. *G. Lawrence.*

Solicitors for the Defendants: Messrs. *Bircham, Dalrymple, Drake, and Birchall.*

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March 16.

Customary Lands—Copyholds—Custom—Evidence—Mines and Minerals.

In lands held by copy of court roll, not at the will of the lord, but according to the custom of the manor, the freehold is in the lord; and in the absence of custom (the onus of establishing which lies upon the tenant) the tenant has no right to work the minerals.

The existence of a customary, compiled within the period of legal memory, is conclusive evidence against the existence of a custom not mentioned therein.

The customary of a manor, compiled within the period of legal memory, recognised a right in the tenants to dig coal "*propriis usis.*" It appeared, from subsequent documents, that the privilege of digging coal for their own consumption had been enjoyed by the tenants under the waste, but there was no evidence of a similar restricted enjoyment by the tenants under their customary inclosures.

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There was evidence of tenants having, during a long period, dug coal in their customary inclosures for sale:—

Held, that the custom was restricted to digging in the waste for coal for the tenants' own consumption, and that the tenants had no right of digging coals under their customary inclosures.

THIS was a suit by the Duke of *Portland*, as lord of the manor of *Bolsover*, in *Derbyshire*, for the purpose of restraining the Defendant, the owner of copyhold lands, held according to the custom of the manor, from exercising the right claimed by him of working for coals under his own copyholds, and appropriating the coals when obtained, either for purposes of sale or for his own use.

The manor of *Bolsover* in the parishes of *Bolsover* and *Clown* in *Derbyshire*, is an ancient manor which belonged to the Crown in the time of *Edward the Confessor*, but is stated in Domesday Book to have been held, together with the lands in demesne, meadows, and other particulars, by *William Peverill*. It appears to have again come into the possession of the Crown, and to have been the subject of various grants and resumptions until the seventh year of *Edward* VI., when it was granted to *George* Lord *Talbot*, Earl of *Shrewsbury*, through whom, by divers assignments and successions, the Plaintiff was now seised of the manor as tenant for life.

It was alleged by the bill, and admitted by the answer, that there had been within the manor, from time immemorial, copyhold lands held of the lord by copy of court-roll, not at the will of the lord, but according to the custom of the manor, which custom is embodied, regulated, and set forth, in an ancient customary, prior to the grant by King *Edward* VI., now in existence, and relied upon by both sides in the present controversy. The manor comprises about 5,829 acres, of which about 4,292 are held by copy of court-roll, the residue being freehold belonging to the Plaintiff. Previous to the passing of an Inclosure Act in 1778, these copyhold or customary lands consisted of common or waste grounds, open arable fields, and ancient inclosures.

The Plaintiff, as lord of the manor, claimed to be alone entitled to the coal and other minerals lying under all the customary or copyhold lands, with the exception of those lying under lands formerly common or waste grounds, as to which special provision

was made by the Inclosure Act of 1778, and denied any right in the tenants of the manor, by custom or otherwise, to dig for and appropriate the coal, or other minerals, under any ancient inclosures, open arable fields, or other lands held by copy of court-roll within the manor.

The Defendant was the owner of certain of these copyholds, consisting partly of old inclosures, and partly of allotments made under the Act of 1778, of open arable fields, and of allotments under that Act out of the commons and waste ground. His claim, as stated in his answer, was that the customary tenants of the manor had from time immemorial exercised various rights and privileges in respect to their customary lands and tenements, other and more extensive than the rights and privileges which are ordinarily had and exercised by copyhold tenants of manors; "and in particular, the right to, and privilege of digging for and winning coal and other minerals out of and from their customary lands and tenements, and of appropriating the coal and minerals so won to their own use, either by selling and disposing of the same, or by consuming the same upon their own lands and tenements, and the lords of the said manor have not had or claimed any right to or interest in such coal and minerals, save only and except the mines and minerals lying in and under the lands referred to as commons and waste grounds."

The customary of *Bolsover*, which was relied upon both by the Plaintiff and the Defendant as evidence of the customs of the manor, was in Latin, and though of unknown date, was evidently compiled prior to the grant by *Edward* VI., and while the manor was still in the hands of the Crown.

This document, which remained in the custody of the lord of the manor or his steward (and was admitted in evidence by the Court of King's Bench in 1786, in *Denn* v. *Spray* (1)), was in Latin, full of abbreviations, and divided into sections irregularly numbered.

It was thus headed:—

"Cum de consilio ḋni regis et ex assensu omniū tenenc̃ et sucmanoz̃ maſſii dicti ḋni reg̃ de Bollesover et modū tenure sue ad

(1) 1 T. R. 466.

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speciale rogaĩ suū in sc̃ipt̃ expresse ordinaverñt patet in sequent̃ ꝑut antecessoĩ sui a tempore Gulielmi Conquestoĩ tenere consueverñt que quidē script̃ ōibo⁹ hōib⁹ hujus mañii et hered̃ de se ꝑveñ in insecutū remanebunt imꝑpetuū."

According to this document, the tenants and the sokemen (*sucmanni*), were allowed common of pasture in all places of the wood of the lord the king, except for goats, and to take the nuts and acorns falling to the ground for their pigs, the bailiff having the right, on the first day, of collecting them *pro suâ voluntate pro commodo proprio*, and then the sokemen. They were also allowed to take thorns from the common woods, to bake, brew, and for their hedges, and branches and dry wood blown down.

Then followed this clause:—

"26. Iĩm licitum est sucmannis fodere carbones maratinos quarreram ꝑpiis usis sine visu forestarii seu liƀac̃one."

They were also allowed to hunt, to take foxes, hares, and birds, and fish, in all places (except in the park and mill pools), "*propriis usis.*" These were the only instances in which the expression "*propriis usis*" occurred.

The next document in point of date was the *Bolsover* decree, made in 1578, in the Court of Requests, by Sir *Christopher Wray*, L.C.J., Sir *William Cordell*, M.R., and Sir *James Dyer*, L.C.J. of the Common Pleas, in a suit between the tenants of *Bolsover* as Plaintiffs, and the Earl of *Shropshire* (lord of the manor), and *Gilbert Talbot*, his son, as Defendants.

After reciting that the said tenants and inhabitants "did in most humble wise exhibit their supplication or bill of complaint unto the Queen's most excellent Majesty against the said earl for and touching divers articles and matters ensuing to, that is to wit" for the making of certain inclosures by the earl in the said manor and lordship "and for that the said earl did not only eat up their commons, but also their corn, with great number of conies, where no conies before there were, and for eating up the greatest part of the residue of their commons with his great number of cattle, and for denying the said inhabitants digging and getting of coals, and also for denying them to have and take thorns to bake and brew with, and to repair and make their hedges, and also to have and take

rods, dry wood, and wood cast down with wind, hollies, and such other house boote," and sundry other griefs and matters "contrary to their ancient customary had in writing," it was by this decree ordered that the earl and his son, their heirs, and assigns, might inclose and hold "to their proper and only use" for ever certain portions of waste ground or common (240 acres already inclosed, 120 acres to be inclosed) within the lordship. In consideration of this concession the earl and his son were deprived of certain rights over the residue of the waste, but it was decreed that they should have "liberty of the getting of coals of and in the said waste grounds appointed to lye open and in common by this decree, and in every parcel thereof," to sink pits, and to have, use, and enjoy his (the earl's) coal mine in the same and as ample manner as before, and to have places there for the laying of his coal upon the same, or to make soughs for the getting of coals in the said waste ground appointed to lie open, with free passage for his servants and carts, for fetching coals at the said pits.

It was also ordered that the copyholders, servants, sokemen, and inhabitants, should solely "have, use, enjoy, and take, to their sole and proper uses, for ever, all the commons, profits, commodities, and feedings, of all the said residue of the said waste grounds and common fields within the manor of *Bolsover*, with all manner of other cattle and beasts, except goats only."

After providing that the tenants might have timber for building with from the waste grounds of the manor, and other perquisites in the shape of estovers and house bootes, except in the lands conceded to the lord for inclosure, it was ordered that the lord should not take or cut down any of the timber trees, or other wood growing upon the waste grounds "resigned and appointed to lay in common for the said copyholders, or any other profits or commodities whatsoever, except coals and getting of coals." The tenants were also to "have and take as their liberties, stone, marle, and quarre, according to the effect and meaning of their ancient custom in that case used in all places of the said waste ground of the said lordship." The tenants were also to "have, for ever, necessary coals digged for them in *Shuttlewood*, at the cost of the lord, for 15*d.* the load, to be taken by them at their pleasure at all times of the year: in case the lord should not provide

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necessary and sufficient coals the tenants might dig for them as before, without let or impediment of the lord, in the wastes of the manor, except in the inclosures allowed to the earl by this decree, and within ten perches of the sough made by the earl for drying water forth of this mine."

It was also ordered that the tenants should not, at any time, "give, grant, sell, alien, depart from, bestow away, or give license or sufferance to take away, to any person or persons, any timber, wood, trees, stone, coals, quarre, marle, common thorns, acorns, nuts, or any kind of commodity or profit whatsoever, of, in, or upon the said commons or waste grounds, or any parcel thereof," with a saving clause of all matters contained in their ancient customary in writing, otherwise "than in this decree declared and ordained."

In 1778 an Act of Parliament was passed "for dividing and inclosing the open arable fields and commons within the manor of *Bolsover*, in the parishes of *Bolsover* and *Clown*, in the county of *Derby*." By this Act, after reciting that the Duke of *Portland* was entitled to all mines of coal and other minerals in and upon the common and waste grounds within the manor or lordship of *Bolsover* intended by the Act to be divided and inclosed, and was also seised of and entitled unto certain closes of land within the manor of *Bolsover*, it was enacted that it should be lawful for the duke, his heirs and assigns, from time to time, and at all times thereafter, to have and enjoy the said mines, and also to dig for, get, and work, for the only separate use and benefit of the said duke, his heirs and assigns, all such mines, and to sink pits, drive soughs, and erect engines, and do all such other work in and upon such parts or places of the said commons or waste grounds for getting, working, and carrying on as well such mines in the said commons and waste grounds, and also all mines in the said several closes or parcels of lands, tenements, and hereditaments, as he and they should think proper; the persons (except the duke) who for the time being should be owners or proprietors of the ground wherein such pits or soughs should be so made, having a reasonable satisfaction made to them for any damage thereby from time to time done. The owners of allotments on the commons and waste grounds so to be inclosed were authorized from time to

time to sink pits and erect engines for the working and getting coal for their own use only upon their own allotments—a distance of ten perches from the coal works of each other being kept by the duke and the owners of the intended allotments respectively. It was also enacted that the several lands which should be distinguished to have been allotted in lieu of copyhold or customary lands should be deemed copyhold or customary lands, and should be held of the lord of the fee thereof, under the same rents, and by the same customs, duties, and services, as the copyhold lands or other property, in lieu of which they were so allotted, were or ought to have been held. It was also enacted that the Act should not prejudice the rights of the lord of the manor of *Bolsover*, or of any future lords of the said manor, in or to the seigniories, royalties, fisheries, manorial rights, and other rights, customs and services incident and belonging to the said manor, or to the lord of the said manor—other than and except such right of soil, clay, or marle, as were on or in the lands to be allotted to any other person by virtue of the Act—all which rights, royalties, privileges, and jurisdictions, were to be enjoyed by the lords of the manor in as full, ample, and beneficial a manner, to all intents and purposes, as the same would have been enjoyed in case the Act had not been made.

On behalf of the Plaintiff, evidence was produced from the court-rolls, between 1638 and 1689, of various proceedings at the Courts Leet and Courts Baron, in which persons were presented and amerced for "carrying away and selling out of the liberty contrary to our custom," wood, clay, stone, and common pit coals.

On behalf of the Defendant, evidence was given of workings by copyholders in their ancient inclosures, and of the sale of coal and limestone openly from these collieries, and also of traces of old coal workings evident into certain copyhold fields belonging to the Defendant, all of which were ancient inclosures.

In one instance a Mr. *Bowdon*, from about 1731, appears to have worked a colliery and sold the coals openly. *Bowdon* was succeeded in this colliery by one *Newton*, who was succeeded by one *Hancock*, in whose time the colliery appears to have been exhausted and given up. *Newton* was also stated to have worked coal, and quarried for limestone, under other ancient inclosures within the manor,

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about sixty years back. Several other instances were given of workings by copyholders for coal, sand, and limestone, and of sales to anybody who would buy, without any license.

On the court-rolls, dated 1746, was a record of a surrender of a close, with the quarries and delphs of limestone and other minerals. In 1754 was recorded a surrender of three closes to *Bowdon*, with full liberty to bore, dig, sink, and search for coals; and again in 1760 a surrender of all coal under these closes.

Evidence was given on behalf of the Plaintiff, in reply, by the past and present stewards of the manor, denying the existence of any custom for the "tenants" to work and dig for coal under their own copyhold lands without the license and consent of the lord, and stating that they (witnesses) had never (except in one instance when the land was not sold) heard of any sale or advertised sales of ancient copyholds within the manor where the value of the coal or minerals had been taken into account. In reference to *Bowdon's* workings, extracts from ancient account books were produced, by which it appeared that he and others had paid rent to the lords of the manor for their "*Bolsover* coppye coal pitts." Some of the other workings were explained as having been made under land of freehold tenure, and some as having been mere desultory acts of spoliation; so inconsiderable as to have been overlooked at the time.

Mr. *Amphlett*, Q.C., Mr. *T. Stevens*, and Mr. *Alfred Bailey*, on behalf of the Plaintiff, contended that in lands of customary tenure, which were held by copy of court-roll, even though not at the will of the lord, but according to the custom of the manor, the freehold was in the lord, and the right to the minerals, in the absence of any custom to the contrary, was the same as in ordinary copyholds, and the tenant could not work without license from the lord: *Bishop of Winchester* v. *Knight* (1); *Marquis of Salisbury* v. *Gladstone* (2); *Doe* d. *Cook* v. *Danvers* (3); *Doe* d. *Reay* v. *Huntingdon* (4); *Roe* d. *Conolly* v. *Vernon* (5); *Blackstone's* Law Tracts (Considerations on Copyholds) (6); *Scriven* on Copyholds (7).

(1) 1 P. Wms. 406.
(2) 6 H. & N. 123; 9 H. L. C. 692.
(3) 7 East, 299.
(4) 4 East, 271.
(5) 5 East, 51.
(6) Page 132, &c.
(7) Vol. ii. Chap. xix.

With respect to the custom or right alleged on behalf of the Defendants, of digging for and appropriating coals under the ancient inclosures, the burden of proving it affirmatively rested upon them, and had not been satisfied. The absence of any mention of it in the customary shewed that there had been a time within legal memory when the custom did not exist, and this was itself fatal to the claim, as no such custom could arise, if it did not exist before the period of legal memory: *The Marquis of Anglesey* v. *Lord Hatherton* (1). Further than this, the alleged custom was unusual and improbable, as the Defendants did not merely claim the right to dig for coal, but to sell the coal off the manor, and even if the clause in the customary applied to the ancient inclosures as well as to the waste, the sokemen were only entitled to take coal for their own immediate use under the words "*propriis usis*, and not to sell for profit." The only case in which any such custom had been established was *Curtis* v. *Daniel* (2), but that differed materially from the present case.

The alleged workings by tenants under the ancient inclosures might all be explained by licences from the lord, or from having been too insignificant to attract notice.

Mr. *Rolt*, Q.C., Mr. *Dart*, and Mr. *Fry*, for the Defendant, contended that the older authorities were express upon the point, that in lands of this tenure held, not *ad voluntatem domini* (which was the distinctive mark of base as opposed to free tenure), but *secundum consuetudinem manerii*, the freehold, or "*franke tenure*," was in the tenants and not in the lord, "as in the case of copyholds of base tenure:" *Coke*, Copyholders (3); *Co. Litt.* (4); *Gale* v. *Noble* (5); *Bingham* v. *Woodgate* (6); *Parrott* v. *Palmer* (7); *Brown* v. *Rawlins* (8); *Reg.* v. *Ingleton* (*Lord of the Manor of*) (9).

It was true that Sir *W. Blackstone*, in his tract upon the right of customary freeholders to vote at the county elections (10), denied them a freehold tenure, but this was merely by way of shewing

(1) 10 M. & W. 218.
(2) 10 East, 273.
(3) Sect. 32.
(4) 59 *b*.
(5) Carth. 432.
(6) 1 Russ. & My. 32.
(7) 3 My. & K. 632.
(8) 7 East, 409.
(9) 8 Dowl. P. C. 693.
(10) Law Tracts, 132, &c.

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that they were not entitled to vote for knights of the shire, and he admitted that there was a freehold interest "though not purely and absolutely freehold." Upon this distinction between tenure and interest the discrepancy might be reconciled, and especially as after the statute of *Quia Emptores* (1), which directed that upon all sales or feoffments of land, the feoffee should hold the same, not of his immediate feoffor, but of the chief lord, no new tenure could be created, and a granting of new customary freeholds would have caused a severance from the manor. If the freehold was in the lord, then he would be entitled (in the absence of any custom) *a cœlo usque ad solum*; but if the freehold was, as Defendant contended, and the older cases shewed, in the customary tenants, then they had a common law right of working the mines and appropriating the coal, although that right might have been so far modified by custom as to give the lord certain rights.

With respect to the customary, the translation given on behalf of the Plaintiff to the expression "*propriis usis*" "their own *private* uses" was absurd and impossible. The real meaning was, that the sokemen were to have the coals for their own absolute use, to do what they pleased with them, and that this was the proper translation of "*propriis*" appeared from *Tyler* v. *Lake* (2); *West's* Symbolography (3).

With respect to the ancient inclosures, the evidence was amply sufficient to establish the right claimed by the tenants: *Hanmer* v. *Chance* (4). It would be most inconsistent too, that the tenants who had a right of working for coals under the lord's waste by the express terms of the customary, should have no such right under their own lands; and the contention of the Defendant was supported by the recital in the Inclosure Act, that the duke was entitled to the minerals under the commons and waste, not mentioning the open arable fields and ancient inclosures.

Mr. *Amphlett*, in reply, referred to the customary rights claimed by the Defendant in his answer, as opposed to the common law right as owner of the freehold, now asserted at the bar. As to the admissibility in evidence of the *Bolsover* customary, he cited

(1) Westm. 3, or 18 Edw. 1, c. 1.
(2) 2 Russ. & My. 183.
(3) Sect. 250.
(4) 11 Jur. (N. S.) 397.

Denn v. *Spray* (1), where it was admitted in evidence by the Court of King's Bench.

SIR W. PAGE WOOD, V.C.:—

The question in this case is one which does not often come before the Courts for decision. It is: Whether the Duke of *Portland*, as lord of the manor of *Bolsover*, is entitled to the minerals under the inclosures of the manor to this extent, that the tenant can be prohibited from working them without the assent of the lord: in other words, whether the Defendant, Archdeacon *Hill*, is entitled to work mines for his own use, without the lord's consent, under certain inclosures which he holds within the manor. The answer distinctly admits that the working claimed by the Defendant is under an ancient inclosure of the manor, and, therefore, a difficulty which might have arisen upon the frame of the bill, from its not specifying particularly under which of the three descriptions of land in this manor the working was, viz., the waste of the lord, the common fields occupied by the tenants without being held in severalty, or the ancient inclosures made by the tenants, is at once removed. The question then turns entirely upon the title to these particular minerals. The Defendant has adduced *primâ facie* evidence, which, if it stood alone without any other evidence in the cause, documentary or other, would clearly be enough to establish the custom averred by him for tenants to work for coals under these ancient inclosures. The case would be much stronger in that respect than *Hanmer* v. *Chance* (2), in which, overruling my decision, Lord *Westbury* held, that a general custom to dig for sand in a certain manor had been sufficiently proved by evidence of working. The circumstances here are undoubtedly strong to establish a general custom. At all events, 110 years ago there was an actual explicit working by one *Bowdon*, under a title made apparent on the court-rolls, and a working which continued for a number of years. There are other instances, and a map is produced by which there would seem to be considerable appearance of ancient workings running under that inclosure. The evidence is, I think, somewhat exaggerated with respect to

(1) 1 T. R. 466. (2) 11 Jur. (N. S.) 397.

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the amount; but, coupled with all the other cases, it would, standing unrebutted, be quite sufficient to establish the custom as alleged. The case, however, presents considerably more difficulty when the documentary evidence comes to be examined. The first question, which lies at the root of this part of the investigation, is: What is the rule of law with respect to customary freeholds, as they are sometimes called, but more correctly, privileged copyholds, of a higher class, and with higher privileges than ordinary copyholds that are held at the will of the lord; but still copyholds in the sense of being held by copy of court-roll, and not being within the *Statute of Wills*, and so of a tenure different from freehold tenure? What, then, is the position with regard to minerals of such copyholders who hold, not at the will of the lord, but to them and their heirs by custom of the manor, and can only pass their property by surrender in the Lord's Court? This seems to have been a question which was much discussed for some time, and from a *dictum* of Lord *Coke*, in his Copyholders (1), which occurs again, *Co. Litt.* (2), there arose a notion at one time, undoubtedly, that these sort of copyholders were freeholders in every respect but this, that they were subject to the customs of the manor under which they held their freehold, and there arose some ground for arguing that they would be entitled to the minerals. The question had not been litigated for a considerable time, but the case of *Gale* v. *Noble* (3) seemed to favour that view. In *The Bishop of Winchester* v. *Knight* (4), however, the question seems to have been plainly and fully before the Court, and to have been plainly and clearly decided the other way. From that time downwards, it does not seem to me that there has been any serious doubt on the matter, though the question has been discussed again and again, particularly in *Roe* d. *Conolly* v. *Vernon* (5); but as far as authority goes, there has never been a decision which has affected to reverse or cast doubt upon *The Bishop of Winchester* v. *Knight*. In the recent case of *The Marquis of Salisbury* v. *Gladstone* (6), it is referred to as being a case of good and sound law, and no doubt, that I know of, has been ever cast

(1) Sect. 32.
(2) 59 *b*.
(3) Carth. 432.
(4) 1 P. Wms. 406.
(5) 5 East, 51.
(6) 9 H. L. C. 692.

upon it. [His Honour, after referring at length to the report (1), continued :—]

Of course, it must clearly have been held that the property was not in the tenant, but in the lord, and then it follows, as in the case of all ordinary copyholds, viz., that the tenant having the possessory right by reason of the grant of the lord, could not have the surface disturbed by the lord against his own grant. But the lord was the owner, and it went to the jury whether there was a custom, and it being impossible to find the custom, inasmuch as no copper mines were before known to exist, the title remained in the lord, and it was so adjudged.

It is almost pedantry to cite authorities after Sir *W. Blackstone's* treatise on this subject, as connected with the rights of voting for knights of the shire, which may have some points of difference, and upon which he comes to the conclusion, that though this species of tenant may be termed a freeholder, as contrasted with copyholders, yet as contrasted with freeholders, he is a copyholder; being so by tenure, though a freeholder by estate—that is, he has an estate to him and his heirs, not at will, but permanent, subject to the custom, though the property of the soil remains in the lord. This principle seems to have been recognised by Lord *Mansfield*, in *Stephenson* v. *Hill* (2), where there was a question on a copyhold exactly of this description, viz., whether or not, there could be a prescription by certain tenants *in non decimando*, and it having been held that, in the case of ordinary freeholders, the tenant could prescribe in right of his lord, and the lords having formerly been spiritual lords belonging to a priory, in which case the prescription *in non decimando* might arise, the question was, whether it was such a copyhold as would give the lord an interest which enabled the tenant to prescribe as under him. Lord *Mansfield*, and *Denison*, J., said it was a settled point, that the freehold is in the lord; and Lord *Mansfield* added: "This is rather stronger than the case of copyholders, for copyholders had acquired a permanent interest in their lands before these persons had done so." The report is short, but it seems to have been obviously the opinion of his Lordship, and *Denison*, J., that everything which custom had not taken out of him must be presumed

(1) 1 P. Wms. 406. (2) 3 Burr. 1273.

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to be in the lord. Now, looking at the *Bishop of Winchester's Case*, and everything done since that time, the decisions on the *Statute of Wills*, and the acquiescence, not only of the profession (as manifested in Serjeant *Scriven's* book on Copyholds), but of all persons in this position (for we have not had any attempt to overthrow the doctrine in that case), I must hold the freehold to be in the lord, until the contrary is shewn by the custom.

That being my view of this point, which is of very grave importance in the case, we come to the documentary evidence, and the *onus* being on the tenants to prove the custom, we are brought to that which is a most material document on the question of custom—the original customary. Upon that document both Plaintiff and Defendant rely. The answer sets it out as strongly as does the bill, viz., "that in all matters between the lords of the manor for the time being and their tenants it has been received and acted upon as, and the same in fact is, evidence of the customs of the manor." As the Plaintiff insists upon the same point, one has no difficulty as to the document itself being evidence, and very important evidence, in the cause. [His Honour, after referring to the form of the customary, and the peculiar mode of numbering the paragraphs, continued:—]

The only inference I can draw from that, where both parties insist upon the document, is, that there were some older customaries from which these particular paragraphs were inserted, so that a compound customary has been made out of the various customaries which have been found at different times to have been put upon the records by the tenants of the manor? What, then, is the custom as to coals, which is provided by the customary, which one cannot doubt, regulates in the most minute degree the course of practice on almost every subject in the manor? Now, there is only one paragraph relating to the subject of coal, which is this: "Itm̃ licitum est sucmannis fodere carbones maratinos quarreram ꝑpiis usis sine visu forestarii seu liḃačone:" the last words being translated "for their own private uses, without view of the forester or delivery." The first point to be ascertained is, does this relate to the waste, to the inclosures, or to both? It certainly must relate to the waste. I do not say it may not reach the inclosures also; but it must relate to the waste, for this reason, that there

is an undoubted custom, admitted by Plaintiff and Defendant, and confirmed by all the documents, for the tenants to dig in the lord's waste, subject to certain limitations and regulations, which appear to have been made subsequently to this customary by the *Bolsover* decree. Then, that being so, what is the meaning of "*propriis usis*?" Of course, when a man is said to take everything "to his own use," uncoupled by any other expression, documentary or otherwise, it would imply that he might do exactly what he liked with it. But I apprehend that is not a sound rule of construction with reference to the custom of a manor, where these words, *propriis usis*, are put in for some purpose or other. If a custom existed of selling those coals dug on the waste of the manor, then, of course, the words would have the sense contended for. But if, on the other hand, the tenants have been invariably amerced for selling out of the manor anything got from the waste then these words may be construed as a license to take for their own use; but not in order to sell. This is shewn distinctly by the rolls of the manor; and, therefore, as regards everything on the waste, it must not be taken for sale, but simply for their own use and consumption, like other estovers. The *Bolsover* decree is quite in harmony with this view, the very last clause of it, with reference to all estovers, being: "And also it is ordered and decreed that neither the said tenants, sokemans, nor inhabitants, nor their heirs, farmers, nor assigns, nor any of them, shall at any time hereafter give, grant, sell, alien, depart from, bestow away or give licence or sufferance to take away, to any person or persons, any timber, wood, trees, stones, coal, quarre, marle, common thorns, acorns, nuts, or any kind of commodity or profit whatsoever, of, in, or upon the said commons or waste grounds (I am confining myself to them), or any parcel thereof:"—thus following the practice on the rolls of the manor, of fining persons who attempted to do any such thing. Now is this restriction general, and to be applied to the inclosures as well as the waste? If it applies to the waste, *propriis usis* means, as I have shewn, for their own use, and not for sale. If the tenants are allowed to dig on both waste and inclosures, it must be under this clause, for there is no other one which gives them the right of digging, and if it applies to both waste and inclosures, the restriction must be the same. We do not exactly

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know when this customary was made, probably not long before the time of *Elizabeth*, and it is undoubtedly within the period of legal memory. But the *Bolsover* decree coming not long after this customary, and the practice of amercing those who sold out of the manor, shewing that any person claiming under this custom could not sell, but only dig for his own use, the evidence that persons have worked under the inclosures for the purposes of sale will not in any way tally with or support this custom. Regard, therefore, being had to the fact, that the practice of digging gives no sanction for holding this to extend to anything beyond the waste, the sounder interpretation is, that all the clauses, immediately before and after, apply to what was to be done on the lord's waste.

There being very commonly, and in almost every manor, large customs over the waste for the benefit of the tenants, in the shape of estovers, such as cutting timber for repairs, quarrying stone, digging sand, and the like, the lord is restrained (that was the object of the *Bolsover* decree) from making such use of his waste which he has not granted out to the tenants as to derogate from that grant, which is assumed by custom to have taken place, of certain uses to which the tenants may apply the waste. Having regard, therefore, to what has afterwards taken place, as shewn by documentary evidence, the sounder construction is, that the particular license in s. 26, is not a license at all over the inclosures; but is confined to the waste. Even if it did apply to the inclosures, it would not avail the Defendant in this particular case, as he claims the right to dig and sell the coal, and, unquestionably, it would not give the right to dig in the inclosures for any purpose except for the tenant's own use. It was suggested that it would be most inconsistent, if the tenants were allowed to do this on the waste, which belongs in a great part to the lord, and not on their own estates. The inconsistency, however, will be found in most of the cases I have referred to. The tenants have privileges over the waste in the shape of estovers, and the like; but the lord does not choose to have his soil disturbed, or his land broken up in that inclosure which was given out for the purpose of cultivation by the tenant; and, therefore, the privilege is confined to the waste. Undoubtedly, he cannot dig there himself without license, when he has once given it for the purpose of inclosure; but there is nothing incon-

sistent in saying, that although the inclosure shall not be dug up and turned into a complete desert, as regards cultivation, the tenants shall have the privilege of getting as much coal as they want in the lord's waste.

Then comes the *Bolsover* decree. A dispute seems to have arisen between the Earl of *Shropshire*, then lord of the manor, and his tenants. [His Honour referred to the recitals and terms of the decree, observing that it related to the waste, and the waste only.]

This decree seems to me to be in every way consistent with the view I have taken. It is undoubtedly silent as to the inclosures, and that silence would leave the mines where we find them, in the lord. The Act of Parliament, in 1778, recites that the lord is entitled to the waste, and to work the coal in it; but any title in him to the inclosures is not recited. But of course there would be no object in dealing with the inclosures. He had no title in them, and nothing was to be proved one way or the other with respect to that; and, therefore, the same silence might be expected as in the decree, since the subject-matter of the coals under the inclosures was not dealt with. The saving clause to the lord of all his rights except in the soil, clay, or marle, obviously could not affect the mines. It is impossible to hold, assuming them to be in the lord, that the mines were intended to be carried away by any such clause as that. I think, therefore, in truth, it comes to this: that in the Act of Parliament I find nothing to assist me, one way or the other, in coming to a conclusion. Then the case is reduced to this: Holding, as I do, that I am bound, by the *Bishop of Winchester* v. *Knight* (1), to consider the right to the mines to be in the lord, until a custom to the contrary is shewn, and that at the time of the customary no such custom of digging in the ancient inclosures was known, and that the custom of digging, not for sale, but for the use of the tenants themselves, applied to the waste alone, it remains to be considered what effect is to be given to this very strong evidence of ownership which has been shewn for 110 years, as opposed to that which is afforded by the old documents on the other side.

Now, it is clear that all these circumstances, though good to prove a custom, in the absence of other evidence, would not prove

(1) 1 P. Wms. 406.

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a custom if it were shewn by the customary that in the reign of *Edward* VI., or, at all events, within the period of legal memory, no such custom existed. The answer must, as given in *Marquis of Anglesey* v. *Lord Hatherton* (1), be, that no such custom can arise from those circumstances; for a custom cannot arise if it did not exist before the time of legal memory. It might be very good evidence of a grant by the lord to each of these tenants of the right in question, if the tenement was a particular tenement; but the Defendant's tenement is not a particular tenement, and he is relying on the general custom alone. That case is one of very great importance, and, with the exception of being a copyhold at will, instead of according to the custom of the manor, it seems to be on all-fours with this case. As to its not being not at will, but according to the custom of the manor, that would be an important distinction if the *Bishop of Winchester's Case* were not law; but that being law, it brings the case precisely within *The Marquis of Anglesey* v. *Lord Hatherton* (2), where the evidence afforded by the customary document was not so strong as here. [His Honour referred, *in extenso*, to the report of that case, and especially to the following passages in the judgments of Lord *Abinger*:—"Surely if a custom existed at that time to give them a right to the minerals, it was natural to expect they would not have omitted it in an elaborate and minute statement of the customs, and they have not stated it;" and of *Alderson*, B.:—"Now, if there be an agreement, or an acting, by any of the copyholders of the manor, under circumstances which, if it be true that they so acted and agreed, render it impossible to believe in the existence of the customs at the time when they so acted and agreed, that acting and that agreement must be evidence whereby the jury would conclude (if it be proved to have occurred after legal memory), that the custom did not then exist, that that is not a custom from time immemorial, and that the subsequent usage on which the Defendant relies is referable to usurpation, and not to right."]

These observations seem to me to be perfectly applicable to this case, for the same circumstances are to be found in both cases —surrenders reserving minerals, surrenders of minerals separately,

(1) 10 M. & W. 218. (2) 10 M. & W. 241, 244.

and several instances of working for minerals, both recently and in old times; but it was there held that the existence of a document, such as the customary, within the period of legal memory, and its silence as to any such custom, negatived it conclusively.

I ought to add, that in the treatise of Sir *W. Blackstone*, and all the cases I have looked into, *Britton* seems to be referred to sometimes as a clear authority one way, and sometimes the other. Having had the advantage of consulting *Britton*, in Mr. *Nicholls's* valuable edition, it appears to me that, beyond doubt, he did not conceive these tenants to be free tenants. The great point of distinction throughout is—do they hold by feoffment, or by copy? [His Honour referred to the following passages from *Britton* (*Nicholls's* edition and translation) (1):—]

"Ancient demesnes are lands which were part of the ancient manors annexed to our Crown, in which demesne dwell some who have been freely enfeoffed by charter; and others who are free of blood and hold land of us in villenage and these are properly our sokemen, and are privileged in this manner; that they are not to be ousted from such tenements so long as they perform the services which appertain to their tenements, nor can their services be increased or altered, so that they shall do any other or greater services, or in any other way than as they have been used to do. And because such sokemen are the tillers of our lands, we will that they be not summoned anywhere to toil in juries or inquests."

And again: "Villenage is a tenement of the demesne of any lord delivered to be held at his will by villein services to be cultivated for the use of the lord. In the same manors of our ancient demesnes there are also pure villeins, both by blood and by tenure, who may be ousted from their tenements, and deprived of their chattels at the will of their lords."

In another passage, under the head "Assise" (2):—

"All persons have not equally a right to recover by this assise. For this remedy shall not be granted to any person ejected from a possession which he held in another name, as bailiff, guardian, or attorney, or to a farmer holding for term of years, or to those who

(1) Book iii. chap. 2, p. 165.

(2) Book ii. chap. 12, p. 113.

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hold any demesnes by villein custom, without title of gift or feoffment."

That is the point he constantly insists upon. When the tenants hold by gift, or feoffment, they are freeholders: when they hold by copy of court-roll at all, then they do not hold otherwise than as copyholders, and do not hold the freehold in any sense which could carry over the lord's interest in the mines to them.

Under these circumstances I do not feel any doubt that, in whatever way these usurpations, if usurpations they be, arose, or whether the workings were by agreement, they are not sufficient in the face of that old customary to prove the right of the Defendant to dig under these lands. There must be an account, and an injunction to restrain the Defendant from digging under his copyholds within the manor, being ancient inclosures or land allotted to his predecessor in title as copyholds out of the open fields.

Solicitors: Messrs. *Bailey, Shaw, Smith, & Bailey*; Messrs. *R. & W. B. Smith*, for Mr. *C. S. Busby*, of *Chesterfield*.

V.-C. W. 1866, *June* 22; *July* 6.

JARMAN *v.* VYE.

Will—Construction—Dying in the lifetime of A. without leaving Issue—Real Estate.

Gift by will of a freehold house and the furniture therein to *A.*, but if *A.* should die in the lifetime of *B.* without leaving lawful issue, then over.

A. died in the lifetime of *B.*, leaving issue, who all died in the lifetime of *B*:—

Held, that the gift over took effect.

DANIEL BAYLY JARMAN by his will, dated the 8th of July, 1845, made a general devise and bequest of all his real and personal estate to his son *John Leake Jarman*, and his son-in-law *Jesse Vye*, their heirs, executors, administrators and assigns, upon trust to convert the personalty, and thereout to pay his debts, funeral and testamentary expenses, and to invest the residue in the public stocks or funds, and out of the income thereof, and out of the

rents of the said real estate, to pay an annuity of £150 to his wife for her life; and upon further trust to permit his wife to use and occupy his two freehold houses, 4 and 5 *Effingham Place, Ramsgate,* and all his goods and furniture therein at his death, for her life; and testator directed his trustees out of his estate and effects to keep the said houses in repair, and also the goods and furniture therein insured from fire. From and after the death of his wife the testator gave two pecuniary legacies to his granddaughter *Mary Ellen Jarman,* and his grandson *Robert Lyons Pantin,* respectively. He then gave to his granddaughter *Sarah Pantin,* his one-sixth share in another freehold house, No. 12, *Nelson Crescent,* and of the goods and furniture therein. He also gave to his granddaughter *Lina Ann Ashmore Pantin,* his one-sixth share in another freehold house, No. 6, *Sion Hill,* and the goods and furniture therein. Power was given to the trustees at their discretion to sell the above two-sixth shares, and invest the sale moneys, and they were directed to stand possessed of the proceeds in trust for the said legatees, to be transferred to them on their attaining twenty-one; if they should not attain twenty-one in testator's wife's lifetime, then immediately after her death. The will directed that if the said *Robert L. Pantin, Sarah Pantin,* and *Lina A. A. Pantin,* should "all" die before attaining twenty-one, or "in the lifetime of testator's wife, without leaving lawful issue," the legacy or share of him or her so dying was to go to the survivor or survivors. As to all the residue of his real and personal estate, he gave, devised, and bequeathed, two third shares thereof unto and between the said *John Leake Jarman* and his daughter *Jane,* wife of the said *Jesse Vye,* in equal shares. The remaining third he devised and bequeathed to the said *John Leake Jarman* and *Jesse Vye,* their heirs, executors, administrators, and assigns, upon trust for his son *William Guy Jarman,* then abroad.

The testator died on the 3rd January, 1846. His widow, *Ann Jarman,* died on the 20th of April, 1863. The four grandchildren mentioned in the will all survived the testator. *Robert L. Pantin* attained twenty-one, and died in the lifetime of *Ann Jarman. Sarah Pantin* attained twenty-one, married *Alfred Rust,* and died in *Ann Jarman's* lifetime, leaving issue one child only, who died under twenty-one, in the lifetime of *Ann Jarman. Mary E.*

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Jarman had attained twenty-one, and was living. *Lina A. A. Pantin* was living, and under age.

Jesse Vye died on the 10th of April, 1863.

The bill was filed by *John Leake Jarman*, the surviving trustee and executor, against *Jane Vye*, and *William Guy Jarman* (when he should come within the jurisdiction) for administration so far as related to the specific devises and bequests to *Sarah Pantin*, afterwards *Rust*, and *Lina A. A. Pantin*, respectively, and to other specific bequests; and one of the questions was as to the destination of the share devised to *Sarah Pantin*, afterwards *Rust*.

It was admitted that the word "all" in the will must be read as signifying "any of them."

Mr. *Rolt*, Q.C., and Mr. *Haddan*, for the Plaintiff:—

The gift is to *Sarah*, to be transferred to her at twenty-one; and if she should die in the lifetime of the widow "without leaving lawful issue," then over. She died in the lifetime of the widow, leaving lawful issue, and that issue died in the lifetime of the widow. The question is whether the gift has become absolute in her, or goes over.

The point is decided with regard to personal estate in *Crowder* v. *Stone* (1), where Lord *Lyndhurst* says (2): "Death without lawful issue denotes generally an indefinite failure of issue. But in this case a time is limited within which the failure of issue is to take place, and that is the time when the fund is to become divisible, and the shares are to be paid." It was accordingly held that the legatee's personal representative took nothing.

The question with regard to real estate is stated by Mr. *Jarman* (3), who observes that three constructions present themselves—1, to read the limitation as applying to the contingency of *A.* dying in *B.'s* lifetime without leaving issue at *A.'s* death; 2, to the contingency of *A.* dying in *B.'s* lifetime, and there being an indefinite failure of issue, either before or after *B.'s* death; 3, to that of *A.* dying, and there being a failure of issue, both happening in the lifetime of *B.*; and he says that *Crowder* v. *Stone* is a solitary example of the third construction applied to personalty. The

(1) 3 Russ. 217. (2) Ibid. 222.

(3) Jarman on Wills, vol. ii. pp. 482, 483.

editors of the 3rd edition of *Jarman* on Wills add, that this appears also to be the opinion of Vice-Chancellor *Wood*: *Greenwood* v. *Verdon* (1). There appears to be no authority in the case of realty. Part of the bequest, the furniture, consists of personalty.

Mr. *Bardswell*, for the Defendant.

Mr. *G. M. Giffard*, Q. C., and Mr. *Burgett*, for *Lina A. A. Pantin*, the survivor of the grandchildren:—

Crowder v. *Stone* (2) rules this case. Lord *Lyndhurst's* judgment, and Mr. *Jarman's* observations upon it, were both before the *Wills Act* (3), and have to a great extent lost their application since the statute. But what *Crowder* v. *Stone* decides is this—that "dying in the lifetime of *A.* without issue" is not confined to death in *A.*'s lifetime without issue living at the legatee's death, but extends to death and failure of issue in *A.*'s lifetime. The legatee may have issue, but if the issue do not survive the tenant for life, it is still a death without leaving issue.

Mr. *Morshead*, for the heir-at-law of *Sarah Rust*.

The husband of *Sarah Rust* had been served, but did not appear.

Mr. *Rolt*, in reply.

July 6. Sir W. PAGE WOOD, V.C., after stating the facts, continued:—

This case is one which I think I cannot distinguish in principle from *Crowder* v. *Stone* (2), which really is on all-fours with it; for with respect to real estate, and apart from the statute, the words "dying without issue" mean the same as the words "dying without leaving issue," namely, an indefinite failure of issue.

Now the *Wills Act* directs that when you have words like these, which are open to three constructions, namely: death of the legatee in the lifetime of the tenant for life, without having issue living

(1) 1 K. & J. 74, 89. (2) 3 Russ. 217.
(3) 1 Vict. c. 26, s. 29.

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at the legatee's death; death of the legatee in like manner, without having issue living at the death of the tenant for life; and death of the legatee in the lifetime of the tenant for life, followed by an indefinite failure of issue; you are not to take that construction which gives an indefinite failure of issue.

But *Crowder* v. *Stone* (1) decided that dying "without lawful issue" in the lifetime of *A.*, extends to the event of death, and failure of issue, both happening in the lifetime of *A.*

The decision in *Crowder* v. *Stone* did not leave these three constructions open, but determined that in a will worded like that before me "dying without issue" was to extend to a failure of issue in the lifetime of the tenant for life. I do not see the possibility of distinguishing this case, and I must hold, that as *Sarah Pantin* died in the lifetime of the widow, without leaving issue living at the widow's death, the gift to the survivors takes effect. The house and furniture will go together.

There will be a declaration accordingly.

Solicitors for all parties: Messrs. *Mercer* & *Mercer*, agents for *Mercer & Edwards, Ramsgate.*

(1) 3 Russ. 217.

BARRETT *v.* HARTLEY.

V.-C. S.
1866
May 1, 2.

Bonus to Trustee or Mortgagee—Settled Account.

A trustee has no right to exact or charge any remuneration or bonus in respect of great advantages accrued to the *cestuis que trust* from services incident to the performance of the duties imposed by the deed of trust.

A settled account by a *cestui que trust*, allowing a bonus to the trustee, set aside.

8 Ch 487
2 Ch D 156
7 Ch D 62

THOMAS BARRETT the elder, deceased, and the Plaintiff, *Thomas Barrett* the younger, prior to, and in the year 1848, carried on the business of cotton-spinners in *Lancashire*, under the firm of *Thomas Barrett & Son*, and the firm was indebted to *John Hartley*, the late husband of the Defendant, *Martha Hartley*, who was a sister of *Thomas Barrett* the elder, and also indebted to other persons.

John Hartley agreed to make to the firm a further advance of £3000 beyond the amount then due, upon having an assignment of all the personal estate and effects of *Thomas Barrett* the elder and the Plaintiff, and accordingly, by an indenture dated the 1st July, 1848, made between them of the one part, and *Hartley* of the other, after reciting that they had for some time past carried on business as cotton-spinners in co-partnership; that they were indebted unto *Hartley* in the sum of £9000 sterling, and unto the several persons or firms mentioned in a schedule in the sums set opposite to the names; that they were not able fully to meet or discharge the several debts owing by them, and were also unable to carry on their business to advantage without further money for the purposes thereof; and that they, in order to secure and provide for the payment of the debts owing, together with interest, had agreed to execute unto *Hartley* such assignment of their estate and effects upon the trusts, and with the powers expressed and contained therein, it was witnessed that in pursuance of the agreement, they assigned unto *Hartley*, his executors, administrators, and assigns, all their stock in trade, wares, merchandize, machinery, fixtures, utensils, household and other goods, leasehold estates, chattels of every description, sum and sums of

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money, debts due and owing, ready money, bonds, bills, notes, and securities for money, books, papers, and writings, and all other their personal estate and effects, together with full power and right of entry into and upon all and every the mills, factories, messuages, buildings, or tenements, wherein the same were or might be, to hold upon trust, that he (*Hartley*) should take possession thereof, with power to accept compositions for debts, and to allow time for payment of debts; and should, for so long as he in his discretion thought fit, carry on the business in the manner therein mentioned; and should at such time as he in his discretion thought fit, absolutely dispose of all the property (above mentioned), and from the profits or proceeds pay the costs, charges, or expenses incurred; pay himself the moneys that he might bring into the concern, with interest; pay all debts which should be incurred in carrying on the business; pay himself and the creditors specified in the schedule the debts mentioned, with interest; and pay the surplus, if any, to *Thomas Barrett* the elder and the Plaintiff, their executors, administrators, or assigns. The indenture contained no proviso for redemption or for re-assignment.

The debt due from the firm to *Hartley* was agreed upon on the 1st of July, 1848, at the sum of £6000 9*s.*; and on the same day he advanced to the firm the further sum of £3000. After the execution of the indenture, the business was carried on under the supervision of *Hartley;* and he received large sums of money on account thereof, and made various payments, and he paid off the debts owing to persons other than himself.

Hartley, from time to time, made up an account of the moneys which he alleged to be due to him from the firm; and in it he, on the 1st of July, 1854, credited himself not only with the principal sum of £7000, and with the sum of £350, being interest, both of which he alleged to be due, but also with the sum of £1000, under the head or title of "bonus, six years."

The bill alleged that there was never any agreement whatever between the firm and *Hartley* that he should charge any further sum than the principal money due, and interest at £5 per cent.

The Defendant, *Martha Hartley*, alleged that such bonuses were

agreed to be paid to her husband for his trouble in attending to the business.

The Plaintiff, on the other hand, alleged that the amount of attention given by *Hartley* was very inconsiderable, and involved little trouble, and that, in fact, *Hartley* (who had followed other avocations) knew nothing whatever of the details of the business of cotton-spinning.

Thomas Barrett the elder died on the 6th of May, 1860, and thereupon the property assigned to *Hartley* became the property of the Plaintiff, and he became liable to pay the balance due to *Hartley*, who continued in his account to credit himself with a "bonus" of £100, on the 1st of July, in each of the years from 1855 to 1858 inclusive, and by his account, made up to the 30th of June, 1859, he made it appear that the sum of £3700 was due from the Plaintiff, and on that day he required and compelled the Plaintiff to sign the following memorandum:

"At the date hereof, *Thomas Barrett*, junior, of *Farnworth* and *Prestolee*, is indebted to Mr. *John Hartley*, of *Summerfield*, the balance of his security on the machinery, &c., of the said *Thomas Barrett*, junior, in the sum of £3700; and it is agreed between the said parties that the said *Thomas Barrett*, junior, shall pay off the said sum in the manner following, that is to say, the sum of £250 at the expiration of six months from the date hereof, and the further sum of £250 at the expiration of every succeeding six months until the whole be paid off. And also interest at the rate of £5 per cent. per annum, at the end of every six months, upon so much of the principal sum as shall from time to time be owing.

"As witness the hands of the parties this 30th day of June, 1859.

"*Thomas Barrett*, junior.
"*J. Hartley*."

The bill alleged that it was wholly untrue that at the said date the sum of £3700 was really due; it also alleged that *Hartley* was, at that date, in possession of the business, and could, by exercising the powers of sale contained in the indenture of 1848, have utterly ruined the Plaintiff, and deprived him of the

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means of support; that the Plaintiff was wholly in the power of *Hartley*, and was compelled to sign the memorandum; that *Hartley* took an undue advantage of the Plaintiff's position, and availed himself of the power which he had over the property for the purpose of making the Plaintiff admit that a large sum was due; and that *Hartley* always gave the Plaintiff to understand that he would derive large benefits under his will, which made the Plaintiff unwilling to dispute the claim to charge such bonuses, fearing it would induce *Hartley* to deprive him of all such benefits. *Hartley* died in March, 1861, and under his will the Plaintiff derived no benefit. The defendant, his widow, proved the will.

The bill prayed for an account of what was due on the security of the indenture; that in taking it the sums claimed and charged as "bonuses" might be disallowed; and that, upon payment by the Plaintiff of what should be found due, the Defendant might be ordered to reassign to the Plaintiff the property which remained unrealized, and to deliver up the said indenture; for an injunction to restrain the Defendant from disposing of the property, and for costs.

The Defendant, *Martha Hartley*, by her answer, stated that her husband, with the entire concurrence and consent of the Plaintiff and his father, personally superintended the management of the business, and for ten or eleven years devoted a great part of his time to such management; that her husband paid off all the debts which were, in July, 1848, owing to persons other than himself by the firm; and in consequence of his exertions and the capital which he lent, the Plaintiff and his father were relieved from their embarrassment, and their business was established, and had become profitable.

She also stated that she had heard the Plaintiff admit, in 1854, the justice of allowing her husband the sum of £1000 up to that time, and £100 a year out of future profits, and further stated that no pressure was used to induce the Plaintiff to sign the memorandum of the 30th of June, 1859, and that she believed the Plaintiff's allegation as to his expectations of deriving large benefits under the will of her husband to be a mere pretence.

The evidence, in reference to the supervision of *Hartley* over the

business, the acquiescence or consent of *Thomas Barrett* and the Plaintiff to the allowances of the bonuses, was conflicting.

Mr. *Bacon*, Q.C., and Mr. *E. K. Karslake*, for the Plaintiff:—

The only question is, whether, in taking these accounts, the mortgagee is entitled to these sums called "bonuses." The terms of the indenture of July, 1848, are relied upon, and also upon the accounts as kept by the parties themselves. The Court will not allow a bargain to be made between a mortgagor and mortgagee which shall give to the mortgagee a larger benefit than stipulated for. This principle is firmly rooted, and cannot be disturbed. Any agreement for the payment of these bonuses would be against the law, but there is no evidence that there ever was any such agreement. The statement that *Hartley* rendered great services to the firm is absurd, for he was not, from his previous avocations, in a position to do so, but if any were really rendered they must be considered as gratuitous; there could be no payment for them. The facts of the case are not disputed, and upon them, and the case set up by *Martha Hartley*, the Plaintiff is entitled to an account, and the Defendant, *Martha Hartley*, ought to have credit given to her for the principal and interest only which was due and accrued due during the time the mortgage existed. There could be no acquiescence in the claim of *Hartley* until the relation of mortgagor and mortgagee had ceased. Any stipulation for the payment of bonuses to *Hartley* would have been a fraud upon the other creditors of the firm. *Hartley* could not have what the other creditors could not have. When, in 1854, *Hartley* took credit for the £1000, no consideration moved from him to the firm. It was a case of extortion. No compensation is ever allowed to a mortgagee for extra risk—no advantage of any kind *ultra* the principal and interest stipulated for by the deed. The other creditors were to be paid *pari passu* with *Hartley*, and they were paid according to the terms of the deed. [The following cases and authorities were referred to: *Bonithon* v. *Hockmore* (1); *French* v. *Baron* (2); *Godfrey* v. *Watson* (3); *Scott* v. *Brest* (4);

(1) 1 Vern. 316.
(2) 2 Atk. 120.
(3) 3 Atk. 517.
(4) 2 T. R. 238.

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Langstaffe v. *Fenwick* (1); *Lord Trimleston* v. *Hamill* (2); *Bythewood & Jarman* (3); *Coote* on Mortgages (4).]

Mr. *Malins*, Q.C., and Mr. *E. E. Kay*, for the Defendants:—

The payment of these bonuses was made under a collateral contract of a totally different kind to, and had nothing to do with the mortgage. The mortgagee was paid for services which he rendered to his relatives for rescuing them from ruin. The money was paid at the time of the contract, and was not brought into any account. If a mortgagee becomes a clerk to the mortgagor, is he not to be paid for his services? To what extent is the rule of the Court to go? There was no bonus paid after 1859. The bill was filed in November, 1864. Five years elapsed after the settlement of accounts which comprised the bonuses, and, consequently, the Plaintiff fully acquiesced in it. This is a case quite *per se*. No such case has occurred before. The cases cited have reference to mortgage accounts. Though a mortgagee will not be allowed to make charges in the absence of agreement, yet there is nothing to prevent agreements being entered into. *Hartley* acted under the collateral agreement, which was ratified over and over again, and it was not until after the mortgagee had died that the Plaintiff complained of the charges made by him for the great services which he had rendered. The Plaintiff has raised the question when *Hartley*, who could easily have proved the dishonesty of it, cannot be brought as a witness against him. The complaint is utterly without foundation, and the Plaintiff ought to be decreed to redeem the mortgage upon the footing of the account stated, and pay the costs of the suit. *Fisher* on Mortgages and Priority was referred to.

SIR J. STUART, V.C.:—

In order to render a contract, or an agreement of any kind, binding, there must be the assent of both parties to the agreement under such circumstances as to shew that there was no pressure—no influence existing of a kind to make the assent an imperfect assent, or an assent which, under other circumstances, would have

(1) 10 Ves. 405.
(2) 1 Ball. & B. 377.
(3) 3rd ed. vol. v. p. 402.
(4) 3rd ed. p. 34.

been refused. If the assent to the agreement is not an assent given under such circumstances as that both parties are on an equal footing, and the agreement one perfectly free from any influence or pressure, in the eye of this Court, it is not an assent sufficient to constitute an agreement.

Cases have been referred to in which, with reference to the law of mortgagor and mortgagee, when the usury laws existed, where there was a clear and decided contract for a loan at a certain rate of interest, the Court would not permit a mortgagee to obtain a collateral advantage, under the shape of commission for collecting rents, or of a *bonus*, or by whatever other name it might be called, from the mortgagor, or anything beyond the terms of the contract. Nor even under the contract, where it was an exaction beyond that limit which the Court would permit. It is perfectly true that the cases where that was so determined were cases when the usury laws were in existence, and when it was said that such bargains by a mortgagee for some advantage beyond the legal interest stipulated for by the deed, would be a cloak for usury. But it is an observation of some importance now that the usury laws are repealed, that one effect of such repeal was to bring into operation, to a greater extent than formerly, another branch of the jurisdiction of this Court which existed long before them—I mean, that principle of the Court which prevented any oppressive bargain, or any advantage exacted from a man under grievous necessity and want of money, from prevailing against him. Whoever has attended to the subject must have seen that the moment the usury laws were repealed, and the lender of money became entitled to exact anything he pleased in the name of interest, from that moment that jurisdiction of the Court which prevailed independently of the usury laws was likely to be called into active operation.

The deed in question has been called a mortgage deed, and, in the sense that it was a deed given as a security for moneys, it undoubtedly may be conveniently called by that name. But its real character is an assignment of personal estate upon the trusts therein mentioned—those trusts being for the payment of certain debts and the security of a large sum of money advanced by the late Mr. *Hartley*. The terms and purposes of the deed are of

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essential importance. The whole of the property of the partnership was absolutely vested in *Hartley* for various purposes, as to all of which the character of a trustee is carefully fastened upon him. [After stating the purposes of the deed, His Honour continued:—]

There can be no doubt that the right of the *Barretts* to the surplus, after payment of the debts, including *Hartley's*, with interest at 5 per cent., is clear. *Hartley* was clearly a trustee of any surplus, after he and the other creditors had got their money and interest at 5 per cent. But, besides those purposes, there were vast powers and discretion given to *Hartley*. He was not bound to carry on the concern longer than, in his own discretion, he thought fit—he had power to sell it all at any moment, and his powers were absolute and complete. The Defendant, Mrs. *Hartley*, has, no doubt, truly described, in her answer, the position of her late husband, and of the partners, to be this, that by the advance then made by Mr. *Hartley* they were saved from ruin, and that, under *Hartley's* management and supervision, the concern was prosperous. All the debts due to the other creditors seem to have been paid very soon after the deed was executed, and *Hartley's* own debt was largely reduced.

I have already adverted to the law of this Court as to bargains between a mortgagor and a mortgagee; but there is another very well established principle of this Court, that a trustee is not to exact anything for his services. For the Defendant it was contended, that although the payment was called a *bonus*, it was for important services rendered. No doubt the importance and benefit of the services can hardly be exaggerated. But a trustee who greatly benefits his *cestui que trust* by performing his duties, is not entitled to say to him that he will not give him his property, or proceed to execute the trust, unless he be paid a bonus. A trustee who accepts the office without any stipulation on the subject, as this trustee did—for the stipulations here were that he should get his money back, with interest at 5 per cent., and ample security—has no right to say, at any moment when he chooses to do so, that he will exact a certain sum for his past services. The Plaintiff states that he was made to enter in the books £1000

as a bonus, and that he did not venture to remonstrate. Although it is called a "bonus," it was contended for the Defendants that it was not a bonus, and not a gift, but that it was a payment for valuable services rendered.

Let it be considered that the security was insufficient, and that *Hartley's* was an act of kindness which nobody else would have shewn. Still there is no law in this Court that will permit a person, who has shewn such acts of kindness, at his own mere will to say that, for them, "I must have £1000." It may be perfectly true, as the Defendant, Mrs. *Hartley* says, that nobody else would have done what her husband did. But that is not a reason for allowing the bonus which he thought proper to charge.

The principles of this Court on this subject should be perfectly understood. If the Plaintiff was under no pressure; if there was nothing operating on his mind which prevented him, as there was here, from remonstrating; but if he had been so free a man that he might have remonstrated, and said to *Hartley:* "If you insist on this claim, I shall go to somebody else, because it was not bargained for that, at the end of six years, you were to charge £1000, and I shall not permit the account to be stated in that way;" that would have shewn that he was entirely free from pressure. This Court will not allow anything to be taken from a man against his will, in the settlement of an account or in any other way, unless he be a reasonably free agent, and in a situation to enable him fairly to make a bargain for himself. *Langstaffe* v. *Fenwick* (1), before Sir *William Grant,* was the case of an attorney who lent money to his client, and took a mortgage of his estate. The property lent was of a very troublesome kind to manage. The mortgagee did not apply for a receiver; but he received the rents himself, and by an arrangement, which seemed very convenient, he charged the mortgagor only as much as a receiver would have charged. The question there was, whether, after the client had submitted to this—where the account was clearly settled between them on that footing—that transaction could stand; and it was decided that it could not; that although the client did assent, it was an assent given under such circumstances that it could not bind him. In the present case there are circumstances of

(1) 10 Ves. 405.

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pressure and of difficulty on the part of the Plaintiff which did not occur in that case. Here the evidence on both sides shews that the Plaintiff and his father could not help themselves. The power of the one partner to bind the other, in a case of this kind, is beyond a doubt. But it is another thing where one of the two partners was totally helpless, and could not interfere at all. He never bound himself; but the other partner, the Plaintiff, who did, had no choice in the matter; he was under that degree of pressure and of obligation that made his assent one which was given under such circumstances as this Court holds to go for nothing.

It is of some importance to observe that what is called the settlement of account of 1859, was made, not with a view to ascertain the sum due,—for that had been agreed upon by both parties,—they were content to take the sum due, with the charge of the bonuses made by *Hartley;* but it is merely by way of recital that the amount due is stated in the agreement. The real purpose of the agreement was to have the money paid by instalments of £250 every half year. It may be said that this is an agreement, the benefit of which was had by the Plaintiff and his father, because the time was extended, and would not have been extended unless they had come under these terms. Still there remains the question, was this done under pressure? Was this consented to in such a way as that, with reference to the doctrine that a trustee can charge nothing whatever for his services against his *cestui que trust*, nor a mortgagee make any bargain for bonus beyond the amount of interest, it can stand. In my opinion clearly it cannot. There was such an infirmity in the transaction on account of the position of the Plaintiff, that the rules of this Court do not permit me to hold that he is bound by the allowance of these bonuses. The Defendant, Mrs. *Hartley*, is in no way bound by the agreement of 1859.

Declare that there must be an account of what is due under the deed of 1848, and that, in taking it, all sums claimed as bonuses must be disallowed. There must be no costs on either side up to the decree—the costs having been greatly occasioned by the discussion about the claim for bonuses. There must be a decree for the payment of the balance that may be found due,

and on payment, for a re-conveyance of the property to the Plaintiff.

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Solicitors for the Plaintiff: Messrs. *Chester & Urquhart*, agents for Messrs. *H. M. Richardson & Brandwood, Bolton, Lancashire.*

Solicitors for the Defendants: Messrs. *Mackeson & Goldring*, agents for Messrs. *Glover & Ramwell, Bolton, Lancashire.*

FORSBROOK *v.* FORSBROOK.

V.-C. S. 1866 *May* 1, 2.

Estate Tail—Enlargement—Cy près.

Testator declared his will to be, that his property be inherited by his nephews *C.* and *T.*, and the sons of his late brother *A.*, during their lives, and after the decease of *C.* and *T.* that the eldest sons of *C.* and of *T.* inherit the same during their lives, and so on; the eldest son of each of the two families to inherit the same for ever:—

Held, that the nephews *C.* and *T.* took estates for life, with remainder to their eldest son in tail.

THIS was a special case, filed for the purpose of obtaining the opinion of the Court under the 13 & 14 Vict. c. 35. The case was stated as follows:—

John Forsbrook, having, by his will, given an annuity of 10*s.* per week to his daughter *Sarah*, the wife of one *Brown*, proceeded as follows:—

"It is my will, after the decease of my brother *William Forsbrook*, and my daughter *Sarah Brown*, that my aforesaid real and personal property be inherited by my nephew *Charles Forsbrook*, son of my late brother *Mathew*, and my nephew *Thomas Forsbrook*, son of *Benjamin Forsbrook*, and the sons of my late brother *Thomas Forsbrook*, during their lives, and after the decease of my aforesaid nephew *Thomas Forsbrook*, it is my will that the eldest son of the aforesaid *Charles Forsbrook*, and the eldest son of the aforesaid *Thomas Forsbrook* inherit the said property during their lives, and so on: the eldest son of each of the two families of *Forsbrook* to inherit the aforesaid property for ever."

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The testator died on the 12th of May, 1864. At that time, the nephew, *Charles*, had an eldest son, *W. H. Forsbrook*, and the nephew *Thomas*, an eldest son, *J. T. Forsbrook*.

By an indenture of the 18th May, 1865, to which nearly all the members of the family were parties, *William Forsbrook*, the testator's brother, being therein described as the protector of the settlement, the estate was conveyed to *Joseph Blomfield* to hold the same discharged of the estates in tail male, or in tail of *Charles Forsbrook* and *Thomas Forsbrook*, the sons of the testator's brothers *Mathew* and *Benjamin*.

Disputes having subsequently arisen as to the true construction of the will, a special case was prepared for the opinion of the Court, under the 13 & 14 Vict. c. 35, in which *Charles Forsbrook* and *Joseph Blomfield* were Plaintiffs, and *W. H. Forsbrook*, the eldest son of *Charles*, and *Josiah Thomas*, the eldest son of *Thomas*, were Defendants.

The questions proposed for the opinion of the Court were:—

1. What estates or interest did the Plaintiffs *Charles Forsbrook* and *Thomas Forsbrook*, the testator's nephews, respectively take under the will, and what estates have they under the indenture of the 18th May, 1865?

2. How are the costs to be provided for?

Mr. *W. Pearson*, for the Plaintiffs:—

The testator's general intention, as shewn by the will, was clearly that his brother *William* should take an estate for life, with remainder to his nephews *Charles*, the son of *Mathew*, *Thomas*, the son of *Benjamin*, and four sons of *Thomas* as joint tenants for life, with remainder to the issue of the nephews *Charles* and *Thomas* for ever—*i.e.* in tail.

It is clear if the right construction be to give successive estates tail for ever, that would be void: *Seaward* v. *Willock* (1).

The only mode in which the testator's general intent can be effectuated is by giving estates in tail male to *Charles* and *Thomas* as tenants in common: *Wollen* v. *Andrews* (2); *Brooke* v. *Turner* (3);

(1) 5 East, 198. (2) 2 Bing. 126.
(3) 2 Bing. N. C. 422.

Reece v. *Steel* (1); *Murthwaite* v. *Jenkinson* (2); *Smith's Fearne's* Contingent Remainders (3).

Again: eldest son is a word of limitation and not of purchase, and is often construed, not as indicating a particular person, but the eldest issue male: *Robinson* v. *Robinson* (4); *Chorlton* v. *Craven,* cited in *Mellish* v. *Mellish* (5); *Doe* v. *Garrod* (6); *Lewis* v. *Puxley* (7); *Smith's Fearne's* Contingent Remainders (8).

Adopting that rule, the intention here must be that the eldest son should inherit. Suppose the present eldest sons were to die during lifetime of parents without issue, according to the intention, on the death of the nephews the male issue in course of descent of real estate would take; or suppose the Defendants should die during the lives of their parents, leaving male issue, such male issue were intended to take before the eldest son at the time of the death.

Again: the words are "that the eldest son of *Charles* and the eldest son of *Thomas* should inherit the property during their lives," and so on, &c. The expression "eldest son" has here a clear meaning —not the eldest son of any particular person, but the male issue in course of descent from the two nephews. The expression "eldest son" has the same meaning in both cases.

If this is the right construction of the expression, "eldest son," it must be interpreted as meaning issue male in course of descent; it is a word of limitation, and not of purchase, and gives an estate tail in the nephews. If so, the estate tail has been effectually barred, and the fee is in the Plaintiffs. It will be contended that the eldest sons took estates tail, but that construction would clearly not effectuate the intention, as it would only carry the estate to the issue of these two sons, whereas it is clear that the testator's intention was, that all the issue male of the two stocks should take before the heir-at-law. It is submitted, therefore, that the only mode of effectuating the intention would be to give estates tail in the nephews.

[*Vanderplank* v. *King* was also cited (9)].

Mr. *Eddis,* for the Defendants, was not called upon.

(1) 2 Sim. 233.
(2) Sug. R. P. 258.
(3) Vol. ii. p. 265.
(4) 1 Burr. 38.
(5) 2 B. & C. 524.
(6) 2 B. & Ad. 87.
(7) 16 M. & W. 733.
(8) Vol. ii. p. 268.
(9) 3 Hare, 1.

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SIR JOHN STUART, V.C.:—

The words which direct that the eldest son is to inherit for ever, seem to shew clearly enough that estates of inheritance are given. The real question is, whether the words which enlarge the life estates into estates of inheritance, operate to enlarge the estates of the two first tenants for life, or the estates of the eldest sons of those tenants for life.

It is impossible, in my opinion, looking at the language of the will, upon any principle to hold that there are any words to enlarge the estates of the first tenants for life into estates tail.

The gift is to the testator's two nephews, *Thomas* and *Charles*, during their lives, and after their decease to the eldest sons of those nephews for their lives. It is clear that the eldest sons of *Charles* and *Thomas* take by purchase. In the first place, each of these sons is pointed out, *persona designata*, in existence and certain at the testator's death; secondly, the eldest sons of the nephews are clearly objects of the testator's bounty.

The testator having given to *Charles* and *Thomas* estates for life in express terms, he uses this language, "It is my will that the eldest son of *Charles* and the eldest son of *Thomas* inherit the said property during their lives." It seems impossible to say that the express life estates of the two nephews is enlarged by the subsequent words beyond the life estate. It cannot be said that if the two eldest sons are, as they clearly are, made individual objects of the testator's bounty, they can be so as issue in tail by descent, or otherwise than as remaindermen in tail. If the parents take estates tail they would have the power of defeating limitations given in express terms to known persons, defined as eldest sons.

To hold that the eldest sons of *Charles* and *Thomas* take estates in tail male, seems consistent with all the cases cited. The doctrine of *Seaward* v. *Willock* (1), has no application. The costs must come out of the estate. Declare that the nephews, *Thomas* and *Charles* take estates for life only, and that their eldest sons take estates in tail male.

Solicitor for the Plaintiff: Mr. *Letts*.

Solicitor for the Defendants: Mr. *W. H. Reece*.

(1) 5 East, 198.

COLEBY *v.* COLEBY.

V.-C. S.
1866
June 25.

Locke King's Act (17 & 18 *Vict. c.* 113)—*Collateral Security.*

A sum of £400 borrowed by an intestate on his promissory note, but secured also by a memorandum and deposit of even date of title deeds of real estate in terms as collateral security :—

Held, within *Locke King's Act* (17 & 18 Vict. c. 113).

The heir-at-law, who paid the debts and funeral expenses out of his own moneys as a matter of bounty, but afterwards claimed to be allowed such payment out of the personal estate :—

Held, not entitled to be repaid.

THIS was a summons adjourned from Chambers. On the 3rd of August, 1861, *T. T. Coleby* borrowed from Mr. *H. D. Smith* £400, and on the same day executed an agreement, which, omitting immaterial parts, was as follows :—

"Whereas the said *H. D. Smith* hath agreed to lend to the said *T. T. Coleby* £400 upon his promissory note for that amount, bearing even date herewith, payable on demand to the said *H. D. Smith*, with interest at £6 per cent., and upon having deposited with him, as collateral security for payment of the said £400 and interest as aforesaid, the title deeds hereinafter mentioned: Now these presents witness, that in pursuance of the said agreement, and in consideration of the sum of £400 lent and advanced by *H. D. Smith* to the said *T. T. Coleby*, he, the said *T. T. Coleby*, hath this day delivered his promissory note for the said sum of £400, payable on demand, with interest thereon as aforesaid, unto the said *H. D. Smith*, and hath also deposited in the hands of the said *H. D. Smith* the title deeds mentioned in the schedule hereunder written. And the said *T. T. Coleby* doth hereby promise and agree with the said *H. D. Smith*, that all and every the said deeds and writings in the schedule hereinunder written, and so deposited, shall be and remain a security unto the said *H. D. Smith* for payment of the said sum of £400 with interest at £6 per cent., and that the said *T. T. Coleby* will, after default has been made in payment of the said sum of £400 with interest as aforesaid, if and when required by the said *H. D. Smith*, but at the ex-

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pense of the said *T. T. Coleby*, effectually convey and assure the said houses (enumerating them) unto the said *H. D. Smith*, for all the estate of the said *T. T. Coleby*, but subject to redemption." The agreement then provided that the said indenture of mortgage should contain the usual covenants, and a power of sale, and that no proceedings should be taken by the said *H. D. Smith* to recover the amount of the loan without giving six months' notice, also that *T. T. Coleby* would not pay off the principal without six months notice.

T. T. Coleby died intestate on the 22nd of March, 1864, leaving the said sum of £400 still due on the above-mentioned securities. His widow administered to his estate; his brother, the Rev. *George Coleby*, his heir-at-law, took out a summons, dated the 22nd of November, 1864, to administer his personal estate, and obtained an order directing the usual inquiries. On the 9th of May, 1865, the Chief Clerk made his certificate, by which he found that there were no debts. That the intestate at the time of his death was indebted to *H. D. Smith* in the sum of £400, and £47 17*s.* for interest, secured by the promissory note and the deposit of title deeds, which had been paid by the Rev. *G. Coleby*, and was now claimed by him to be allowed out of the personal estate. That the funeral expenses, amounting to £49 7*s.* 6*d.*, and also some other debts of small amount, had been also paid by the Rev. *G. Coleby*, and that he claimed to be repaid out of the personal estate.

The Plaintiff in his affidavit deposed as follows: "It was my intention to have paid his (the intestate's) debts and funeral expenses out of my own pocket, but circumstances have since transpired which have induced me wholly to alter that intention, and I now claim the distributive share of the personal estate to which I am entitled."

The Chief Clerk submitted the questions to the Court.

Mr. *Malins*, Q.C., and Mr. *Chapman Barber*, for the administratrix:—

This is the very case contemplated by the Act, 17 & 18 Vict. c. 113. The intestate died leaving about £1200 of personal estate, and real estate worth £500 a year, and his heir-at-law takes the whole of his real estate, that is nearly the whole of his property, while his widow, the person for whom he was more especially

bound to provide, takes little or nothing. That a mortgage by deposit is within the Act has been decided by Vice-Chancellor *Wood: Pembrooke* v. *Friend* (1).

Then as to the debts and funeral expenses, the Plaintiff admits he paid them out of his own moneys as a gift, but alleges he has since changed his mind. He has, however, no right to claim repayment out of the estate.

Mr. *J. Hinde Palmer*, Q.C., and Mr. *Boyle*, for the Plaintiff:—

It is not denied that a mortgage by deposit may be within the operation of the Act, but here there is contrary intention, because it is only after failure of the personal estate that the land is to be resorted to. The agreement describes the land in terms as a collateral security, and nothing could more certainly indicate an intention that the mortgage debt is to be paid out of the personal estate. On the second point it has been long settled that a stranger may pay the funeral expenses without making himself an executor *de son tort*, or losing his right to be repaid.

SIR JOHN STUART, V.C.:—

This case comes precisely within the meaning of the Statute, and the mortgaged estate must bear the burden.

The Plaintiff having voluntarily, and as a matter of bounty, paid the other debts and funeral expenses, cannot now, merely because he changes his mind, be allowed the amount out of the estate. He was under no obligation or liability to pay, and had no monies of the intestate in his hands applicable for that purpose. The payment must therefore be treated as a gift, which, indeed, he admits it was, and cannot be recovered. There must be a declaration that the Plaintiff is not entitled to be paid the equitable mortgage debt of £400 out of the personal estate, or to be repaid the other debts and funeral expenses. Let the costs of all parties be taxed and paid out of the fund, except so much of the costs of the suit as have been occasioned by the Plaintiff's claim to the £400. Those costs to be paid by the Plaintiff.

Solicitors for the Plaintiffs: Messrs. *J. & H. Baxter.*
Solicitor for the Defendants: Mr. *J. L. Dale.*

(1) 1 J. & H. 132.

V.-C. S.

1866

June 27, 28.

BROWN *v.* TANNER.

Freight—Assignment—Priority—Mortgage.

The assignee of a particular freight who gave to the charterers notice of his security:—

Held, entitled in priority to the general assignee of all freight to be earned by the same ship, who was prior in date, but gave no notice, and took no steps to enforce his mortgage until after the particular assignee had given notice to the charterer and the cargo had been in part discharged.

JOHN HALL, being the registered owner of the ship *Pharamond*, on the 25th of September, 1862, obtained from the Defendant, *Tanner*, a loan of £2000, and executed a mortgage of the ship *Pharamond*, to secure that amount, interest, and further advances and payments on account current, whereby he assigned and transferred to *Tanner*, his executors, administrators, and assigns, all policies on the said vessel, under which the vessel and freight then were, or might be thereafter insured, and all past and future charter-parties and freight.

The mortgage was registered, in pursuance of the statute, on the 25th of September, 1862. The Defendant *Tanner* took no steps to realize his security, or to take possession of the vessel, until the 26th of September, 1864.

On the 12th of February, 1864, the Plaintiff, at the request of *Hall*, the then registered owner of the ship *Pharamond*, discounted two bills of that date for the sums of £500 each, accepted by *Hall*.

At the time of the arrangement between the Plaintiff and *Hall*, on the discounting of the bills, it was agreed that *Hall*, on being requested to do so, should assign the freight of the *Pharamond* under this charter-party, and the insurances as security for the bills, interest, and costs. Accordingly, by an indenture, dated the 20th of May, 1864, reciting the charter-party, *Hall* assigned to the Plaintiff "the freight and earnings of the ship, and the insurances effected thereon respectively, and all right thereunder, by way of security for the Plaintiff's principal money, interest, and costs."

By charter-party dated the 27th of November, 1863, from *Hall* to Messrs. *King*, the vessel was chartered from *Algoa Bay*, or *Mauritius*, with the cargo, and on the conditions mentioned in the charter-party.

On the 16th of July, 1864, the Plaintiff's solicitors sent to the charterers the following notice:

"To Messrs. *King & Co.*

"32, *Throgmorton Street*,

"July 16, 1864.

"Gentlemen,—On behalf of *Robert James Brown*, of *Cornhill*, in the City of *London*, merchant, we beg to give you notice that by an indenture dated 20th day of May, 1864, *Henry John Hall*, of *Leadenhall Street*, in the City of *London*, the owner of the British ship *Pharamond*, chartered by you on the 27th day of November, 1863, assigned unto the said *Robert James Brown*, his executors, administrators, and assigns, the freight and earnings of the said ship, on her voyage from *Algoa Bay*, or the *Mauritius*, in the charter-party mentioned, and all insurances on the said ship, her freight and earnings, and all benefit thereof, and all the estate and interest of the said *Henry John Hall* therein, and you are not to pay over the freight, or any part thereof, except to the said *Robert James Brown*, his executors, administrators, or assigns, or as he or they may direct.

"We are, gentlemen,

"Your obedient servants,

"*Cotterill & Sons.*"

The ship *Pharamond* reached *London* early in September, 1864, having earned a considerable freight, which was payable by Messrs. *King*. Part of the cargo was discharged, but before the unloading was completed, the Defendant *Tanner*, on the 26th of September, 1864, by his agent, took possession of the ship.

On the 30th of September, 1864, *Tanner's* solicitor served a written notice of the mortgage on the charterers and consignees. He also on the same day served notice of stoppage for freight on the dock company. The Plaintiff also, on the 7th of November, 1864, caused notice of stoppage for freight to be served on the dock company.

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On the 12th of December, 1864, the Plaintiff filed this bill, praying that it might be declared that the Plaintiff was entitled to a charge on the freight, payable under the charter-party, in priority to the claims of the Defendant *Tanner*, and that the said charge might be enforced, and the freight secured for the Plaintiff's benefit under the decree of the Court; that the Defendants might be restrained from paying the freight to any other person than the Plaintiff, or from preventing Messrs. *King* from paying the Plaintiff; that a receiver might be appointed, and (by amendment) that if the Court should be of opinion that *Tanner's* securities had priority over the Plaintiff's, that the Plaintiff might be at liberty to redeem *Tanner*.

The Defendant *Tanner* denied all notice of the Plaintiff's mortgage, and alleged that if *Hall* had concealed from the Plaintiff his (*Tanner's*) mortgage, he had acted fraudulently. The Defendant, however, alleged, that the Plaintiff, by searching the register, would have found that he, *Tanner*, was mortgagee both of vessel and freight. The Defendant further submitted that he was unable to give notice to any one, as he knew nothing of the transactions, and had no means of ascertaining who were the charterers. The Defendant further alleged that he was entitled to the freight as first mortgagee.

Mr. *Malins*, Q.C., and Mr. *G. Druce*, for the Plaintiff:—

It was the duty of the Defendant *Tanner*, in order to support his claim, to have taken possession of the vessel before bulk was broken, which, it is admitted, he has not done. It has been held that a mortgagee who took no steps to obtain possession is not entitled to the freight: *Gardner* v. *Cazenove* (1); *Cato* v. *Irving* (2).

The principle of these decisions is plain. The mortgagee, in order to acquire a lien on the freight, must, in effect, become the carrier, which could only be done by taking possession before the conclusion of the voyage: *Lindsay* v. *Gibbs* (3). Accruing freight passes to the mortgagee of a ship who takes possession before the conclusion of the voyage, but *aliter* if he fails to enforce his right: *Kerswill* v. *Bishop* (4). On these authorities, it is clear that the

(1) 1 H. & N. 423.
(2) 5 De G. & Sm. 210, 223-4.
(3) 22 Beav. 522.
(4) 2 Cr. & J. 529.

Defendant has been guilty of laches, and must be postponed to the Plaintiff.

Mr. *Cotton*, for Messrs. *King*, asked for their costs.

Mr. *Karslake*, for the Defendant *Tanner*:—

The assignment of future freight is valid: *Lindsay* v. *Gibbs* (1); and, therefore, unless the Defendant has been guilty of laches, he is entitled in priority. But what could he do more than he did? The moment he got notice of the ship having earned freight he gave notice. If he had given general notice, supposing the thing possible, it would have had no effect until the relation of trustee and *cestui que trust* had been created. The class of cases most nearly resembling this in principle are cases on the sales of commissions, where a notice before the relation of trustee and *cestui que trust* was established was held to be inoperative: *Buller* v. *Plunkett* (2); *Somerset* v. *Cox* (3); where both notices are given before the relation of trustee and *cestui que trust* is created the dates of the notice are immaterial: *Webster* v. *Webster* (4).

But secondly, the Plaintiff had notice of the Defendant's claim. The registration gave him notice of the mortgage, and notice of a deed is notice of its contents: *Hall* v. *Smith* (5); and not only of its contents, but of facts which the production of the deed would have disclosed: *Peto* v. *Hammond* (6). The Plaintiff, therefore, is affected with notice of the Plaintiff's claim, and must be postponed: *Tunstall* v. *Trappes* (7); *Holt* v. *Dewell* (8).

SIR JOHN STUART, V.C.:—

It was decided in the case of *Lindsay* v. *Gibbs* that the freight to be earned by a particular voyage may be effectually assigned, although the ship and the freight generally may have been previously mortgaged.

It cannot be justly said that mere notice, supposing it to be proved, of the Defendant's mortgage can affect the assignee of

(1) 22 Beav. 522.
(2) 1 J. & H. 441.
(3) 33 Beav. 634.
(4) 31 Beav. 393.
(5) 14 Ves. 426, 429.
(6) 30 Beav. 495.
(7) 3 Sim. 286.
(8) 4 Hare, 446.

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the freight earned during the particular voyage. The assignment to the Defendant *Tanner* was a general assignment, including, amongst other things, all freights to be earned after the date of the deed. But he took no steps to enforce his claim until after the Plaintiff had given notice of his security. This, on the authority of *Lindsay* v. *Gibbs* (1), and of a principle much older than that case, seems decisive. There must be a decree for the Plaintiff with costs. The Plaintiff must pay Messrs. *King's* costs, and recover them from the Defendant. The charterers must pay over the freight, after deducting all proper payments.

Solicitors for the Plaintiff and Messrs. *King:* Messrs. *Cotterill & Sons.*

Solicitor for *Tanner:* Mr. *T. Baker, jun.*

V.-C. S. 1866 *June* 5, 6.

CLARKE *v.* HILTON.

Will—Executor—Trust.

Gift by testator of "all my personal estate to my grandson, his executors, administrators, and assigns, subject to the payment of debts, legacies, and personal expenses, and to the trusts hereinafter contained, upon trust to convert and to stand possessed of the said trust moneys," upon trusts which did not exhaust the funds. The testator then appointed his grandson, with three others, executors:—

Held, that the grandson took the residue beneficially.

JOHN COOKE, by his will, dated the 28th of January, 1864, so far as is material to the present question, made the following disposition:—"I bequeath all my personal estate, to which I shall be entitled at my decease, to my grandson *John Cooke Hilton*, his executors, administrators, and assigns, subject to the payment of my debts, personal and testamentary expenses, and legacies and to the trusts hereinafter contained; upon trust, in the first place, to convert and get in my residuary personal estate, and invest the same as hereinafter directed, with power at the discretion of my

(1) 22 Beav. 522.

said trustee, or the trustees for the time being of this my will, to postpone the conversion: And upon trust to stand possessed of the said trust moneys, upon trust to pay to each of my daughters, *Sarah Hilton* and *Jane Clarke*, an annuity of £400, and on the death of my daughter, *Sarah Hilton*, to pay to her children, including the said *John Cooke Hilton*, the like sum of £400 a year until the youngest child of my said daughter attain twenty-one; and I declare that if any child of *Sarah* shall die in her lifetime, and any child of such child shall be living at her death, then the annual sum of £400, or the share to which such child would be entitled, if living at the death of my daughter, under the trusts aforesaid, shall be held by my said trustee or the trustee or trustees for the time being of this my will, upon such trusts and subject to such provisions in favour of such child as if its parent had lived till the youngest child attained twenty-one; and upon trust to set apart, immediately after the death of my said daughter *Sarah*, or when and so soon as her youngest child shall have attained twenty-one, or which of those events that may last happen, £9000 for the benefit of such of her children as shall be living at her death, and attain twenty-one, in equal shares. And I direct my said trustee, or the trustee or trustees, to pay the same to, and to settle the shares of, the children or grandchildren of my daughter *Sarah*, by deed, or as my said trustee, or the trustee or trustees for the time being of my will, shall in their discretion think proper; and upon further trust immediately after the death of my daughter, *Jane Clarke*, to pay to her children the like sum of £400 a year, until the youngest child of my said daughter *Jane* shall attain twenty-one; and I declare that the said £400 shall be held by my said trustee or trustees upon trust, and subject to the provisions in favour of *Jane's* children, corresponding with the trusts and provisions hereinbefore contained in favour of the children and grandchildren of *Sarah Hilton*, and upon trust to set apart immediately after the death of *Jane*, or when her youngest child shall have attained twenty-one, or which of those events may last happen, the like sum of £9000, for the benefit of *Jane's* children upon trust and subject to provisions in favour of *Jane's* children and grandchildren, corresponding with the trusts in favour of *Sarah's* children and

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grandchildren; and upon further trust to invest the sum of £400 and to pay the interest to *Elizabeth Pickford* for her separate use, and on her death, upon trust to pay and divide the said £400 equally among such of her children as may be then living, and if there should be no such children living at her death, then upon trust for *J. C. Hilton*, his executors, administrators, and assigns; and upon further trust to pay *Mary Ann Deane* £25 a year during her life, to commence twelve months after my decease, to be paid half-yearly: if she marry the annuity to thereupon cease; and as to each of the annuitants, I direct my trustee, or the trustees or trustee for the time being of this my will, to invest a sum sufficient at the time of appropriation to answer by the annual income thereof, the payment of the said annuity, and in the mean-time pay the same out of the monies to arise from my personal estate; such annuity, after appropriation, to be exclusively payable out of the sum appropriated in exoneration of my personal estate, and such sum shall, subject to the payment of the said annuity, form part of the ultimate surplus of my personal estate."

The testator then gave directions as to investments, and gave a house to *J. C. Hilton*, and directions to retain testator's pew; he devised all estates vested in him as trustee or mortgagee to *J. C. Hilton* on the same trusts, and appointed *John Cooke Hilton*, *E. Hilton*, *D. Clarke*, and *S. A. Clarke*, to be executors and executrix of his will, and directed that in case any dispute or question should arise between the persons interested under his will, and the trustee or trustees and executors of his will, with regard to the trusts and provisions thereof, the same should be settled by *John May*.

The testator died in March, 1864, and his will was proved by *Edwin Hilton* and *David Clarke*—the other executors had not yet proved.

A question having arisen as to whether *J. C. Hilton* took the residue beneficially, this bill was filed.

It was admitted that the Act of *Lord St. Leonards*, 11 Geo. 4 & 1 Will. 4, c. 40, did not apply to a bequest to one of several executors.

Mr. *Bacon*, Q.C., and Mr. *Lewin*, for the Plaintiff.

Mr. *Malins*, Q.C., and Mr. *Osborne Morgan*, for the trustees of the settlement of one of the daughters:—

Mapp v. *Elcock* (1), and *Elcock* v. *Mapp* (2), have settled the law upon this subject. The circumstance that the trusts declared do not exhaust the estate has been decided to be immaterial (3). The rule is, that where there is a plain implication on the face of the will, that the testator did not intend the executor or trustee to take beneficially, he is to be considered a trustee for the next of kin. In this will the testator declared trusts, and described the proceeds of the real estate as trust monies.

Again, he directed a conversion to be made, which was unnecessary for the trusts declared, and would have been absurd if he intended to give the whole to *J. C. Hilton* absolutely.

Then, as to the £400 given to Mrs. *Pickford* for life, remainder to her children, the testator went on to provide that in default of issue, the principal should go to *J. C. Hilton*. This clearly shewed an intention that he was not to take the whole surplus. Again, the testator directs the sum appropriated to answer the annuities to form the ultimate surplus: but why form a surplus, if *J. C. Hilton* takes the whole after the specified trusts are satisfied? All these considerations shew a clear intention that *J. C. Hilton* should not take beneficially: *Barrs* v. *Fewkes* (4). The mere fact that he took a specific interest under the will, negatives the intention to give him the whole surplus after exhausting the trusts: *Saltmarsh* v. *Barrett* (5); *Love* v. *Gaze* (6).

Mr. *Renshawe* appeared for *David Clarke*, one of the executors, but took no part in the argument.

Mr. *Greene*, Q.C., and Mr. *Little*, for *J. C. Hilton*:—

The question is one of intention, whether on the whole of the will the Court can find an intention to make an immediate provision for *J. C. Hilton*. The mere circumstance that the testator used the words "on trust" can make no difference, because it is quite clear there is a partial trust which does not embrace the whole gift. The word charge might be held on the whole scope

(1) 2 Ph. 793.
(2) 3 H. L. C. 492.
(3) Ibid. 509.
(4) 2 H. & M. 60.
(5) 29 Beav. 474. Affirmed on appeal, 3 D. F. & J. 279.
(6) 8 Beav. 472.

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of a will to create a trust, as in *Saltmarsh* v. *Barrett* (1), just as the word trust in *Dawson* v. *Clarke* (2), coupled with the word charged, was held not inconsistent with a beneficial interest. The real question is always, What is the testator's intention? Again, in *Hughes* v. *Evans* (3), the word trust occurred more than once, but it was held, on the view of the whole will, that a beneficial gift was intended.

Applying that principle here, it is clear that *J. C. Hilton* was intended to take beneficially. The tenor of the will was, to make an immediate provision for *J. C. Hilton*, which could only have effect by holding that he took the residue.

Mr. *Bacon*, in reply.

SIR JOHN STUART, V.C.:—

This case belongs to a class as to which the most learned Judges have differed in opinion. In *Dawson* v. *Clarke* (4), Lord *Eldon* and Sir *William Grant* held opposite views, and each maintained his own opinion, after knowledge of the other.

In *King* v. *Denison* (5), argued by Sir *S. Romilly* on the one side, and Mr. *Leach* on the other, Lord *Eldon* pointed out the distinction between gifts by will *upon* trusts and gifts by will *subject* to trusts. "If," said Lord *Eldon* (page 272), "I give to *A.* and his heirs all my real estate, charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more, and the effect of those two modes admits just this difference:—The former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest."

Here the testator, in the plainest language, has given to *J. C. Hilton* all his personal estate, subject to debts and legacies, and to the trusts thereinafter mentioned. And afterwards, in referring to these trusts, he uses the words upon trust as a matter of course.

(1) 29 Beav. 744; S. C. 3 D. F. & J. 279.
(2) 18 Ves. 247.
(3) 13 Sim. 496.
(4) 15 Ves. 409; on app. 18 Ves. 247.
(5) 1 V. & B. 260.

But if the property is given to *J. C. Hilton* subject to trusts specified, it cannot be held subject to any other trusts, and if after satisfying the trusts specified there remain a surplus, there is nothing in the language of the gift or in the context to create a resulting trust in favour of the next of kin.

In *Mapp* v. *Elcock* (1) the trust covered the whole property, and the trustee took nothing but a mere trust estate.

But even if the words were a gift to *A. B.* of all the testator's estate on trust, the context might still shew that the trustee was intended to take some beneficial interest. That occurred in *Dawson* v. *Clarke* (2). Sir *W. Grant* noticed the case of *Coningham* v. *Mellish* (3), as shewing how far the Court has gone in holding a trustee was to take beneficially. That case was mentioned with approbation by Lord *Hardwicke* in *Hill* v. *The Bishop of London* (4).

In *Hobart* v. *Suffolk* (5), lands were devised to three persons and their heirs, to the use of them and their heirs upon the trusts hereinafter mentioned. The testator then directed them to convey part of the land to *A.* for life, and part to *B.* in tail, but gave no direction as to the residue of the fee, and the Court held there, that there was a resulting trust for the heir—the gift being to three trustees, of whom two only were related to the testator.

The principle of all these cases is plain. Where property is given to a man subject to certain defined trusts, there remains no right in anyone but the donee when those trusts are exhausted. Where, however, an estate is given to a man in the character of a trustee, without anything to indicate that a beneficial interest is intended, then there is a resulting trust.

In the present case the greatest difficulty occurs in the use of the expression that the donee is to stand possessed of the said trust-moneys on trust. If all the moneys were trust moneys according to the strict meaning of the word, no part of them would be free from the trust. But the whole will must be taken together, and the words of gift give the whole property subject to the trusts, and not upon the trusts. When the trusts are satisfied and the

(1) 2 Ph. 793.
(2) 18 Ves. 247.
(3) Pr. Ch. 31.
(4) 1 Atk. 618.
(5) 2 Vern. 644.

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trust exhausted, the rest of the property remains vested in the legatee or devisee discharged of any trust. But it is a different thing to hold that these words attach a trust to the surplus after the trusts described have been satisfied. There must be a declaration that *John Cook Hilton* is absolutely entitled to the property comprised in the testator's will, subject to the trusts therein contained. The costs must come out of the estate.

Solicitors for the Plaintiffs: Messrs. *Elsdale & Byrne.*
Solicitors for the Defendants: Messrs. *Reed & Phelps.*

V.-C. S. 1866 *June* 23.

ATTORNEY-GENERAL *v.* WILKINSON.

Will—Appointment—Execution of Power.

6 Eq 195.

Testatrix having by her marriage settlement power by will or deed to appoint certain funds, but it not appearing that she was possessed of any other property, by her will, dated in 1822, not referring in terms to the power, gave "all her property and estate whatsoever and wheresoever, and of what nature, kind, quality soever the same might be," to her husband, his executors, administrators, and assigns, for his and their own use and benefit absolutely:—

Held, an execution of the power.

By an indenture dated the 2nd of May, 1817, made in contemplation of marriage between *Harriett Watson*, spinster, of the first part, *James Attfield* of the second part, and *Edward Parkins* and *George Greene* of the third part; reciting that *Harriett Watson* was entitled to £3681 16*s.* 3*d.* consols, and an annuity of £150; it was agreed, among other things, that £381, part of the same, should belong to *James Attfield*, and the remainder be settled upon trust to pay the dividends and income to *Harriett Attfield* for life, and from her death to *James Attfield* for life or insolvency, remainder among the children of the marriage; but in case there were no children, then on the death of *James Attfield*, in trust in such manner, form, and proportions as *Harriett Attfield*, notwithstanding her coverture, by her will duly executed should direct or appoint, and in default for her next of kin, according to the statute.

The marriage took effect. There were no children of the marriage; but on the 17th of October, 1843, *Harriett Attfield* died, leaving her husband surviving. Her will, which bore date the 23rd of December, 1822, was in the following terms:—

"In the name of God, amen. I, *Harriett Attfield*, of the parish of *Kingston-on-Thames*, in the county of *Surrey*, being of sound and disposing mind, memory, and understanding, but mindful of my mortality, do, this 23rd day of December, in the year of our Lord, 1822, make and publish this my last will and testament, in manner and form following: I give and bequeath unto my dear husband, *James Attfield*, of *Kingston-on-Thames*, in the county of *Surrey*, all my property and estate, whatsoever and wheresoever, and of what nature, kind, quality, soever the same may be; I do hereby give and bequeath the same unto the said *James Attfield*, his executors, administrators, and assigns, to and for his and their own use and benefit absolutely; and I hereby make, ordain, constitute, and appoint my said husband, *James Attfield*, sole executor of this my last will and testament. In witness whereof I have to this, my last will and testament, set and subscribed my hand and seal. *Harriett Attfield*."

It did not appear that Mrs. *Attfield* had any other property. The husband proved the will, and died on the 29th of April, 1858. The next of kin of *Harriett Attfield* was a lunatic, not found by inquisition, and this suit by information and bill was instituted on her behalf by her next friend, against the representative of the husband, and the trustees of the settlement.

Mr. *Malins*, Q.C., and Mr. *Tripp*, for the information and bill:—

This will is not a valid execution of the power reserved to the testatrix by her marriage settlement, for it neither refers to the power, or to the fund subject to the trusts of the settlement. It is not affected by the 27th section of the 7 Will. 4 & 1 Vict. c. 26, because it is anterior to the time when the Act came into operation.

This case is governed by *Lovell* v. *Knight* (1) and *Lempriere* v. *Valpy* (2). In none of the subsequent cases has it ever been suggested that they were wrongly decided.

(1) 3 Sim. 275: Aff. on App. Dec. 1831. (2) 5 Sim. 108.

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In *Curteis* v. *Kenrick* (1), the language of the will was different, and the ultimate trust in default of appointment was to the testatrix in fee.

In *Evans* v. *Evans* (2), the Master of the Rolls held that the will was not an execution of the power, and distinctly recognised *Lovell* v. *Knight* (3), and *Lempriere* v. *Valpy* (4), as being well decided. In *Shelford* v. *Acland* (5), he held that that case was not within the authority of *Lovell* v. *Knight* (3), but distinctly on the ground that the language of the will was different. *Davies* v. *Thorns* (6), and *In re Comber's Settlement Trusts* (7), are also in point.

In all the cases where it has been decided that the will operated as a testamentary appointment, there has been, if not in express terms, a reference to the property, at least some plain indication that the will was intended to operate on the property, the subject of the power.

Mr. *E. F. Smith*, Q.C., and Mr. *Yate Lee*, for the representative of *J. Attfield*, and Mr. *Greene*, Q.C., and Mr. *Rasch*, for the trustees, were not called on.

SIR JOHN STUART, V.C.:—

It seems to me that the will must be considered a valid appointment under the power.

The property subject to the power proceeded entirely from the testatrix, and although her will does not refer to the power, it can have no operation at all unless it be treated as an execution of the power. That has always been considered as a strong circumstance to authorize the construction that it was intended to execute the power.

If the intention is clear, the main objection (being that the power is not mentioned) ought not to prevail. And although the words of the will do not mention the particular fund which was subject to the power, as it does not appear she had any

(1) 9 Sim. 443.
(2) 23 Beav. 1.
(3) 3 Sim. 275.
(4) 5 Sim. 108.
(5) 23 Beav. 10.
(6) 3 De G. & Sm. 347.
(7) 14 W. R. 172.

other property, there was none other on which the will would operate.

The bill must be dismissed, but without costs.

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Solicitor for the Plaintiff: Mr. *Joseph John Rae.*

Solicitor for the Trustees: Mr. *Hervè Giraud.*

Solicitors for the other Defendants: Messrs. *Walters, Young, & Walters.*

PEDLEY *v.* DODDS.
DODDS *v.* PEDLEY.

V.-C. S. 1866 *June* 11, 12.

Will—Falsa Demonstratio—Farm—Parcels.

If all the words of description are true, and correctly describe a thing certain, the Court will not presume that there is any error, so as to extend the meaning of the words to something not properly comprehended in the express words.

In 1802 testator purchased an estate called *A.* farm, in the parish of *R.*, in the county of *H.* In 1813 and 1815 he acquired adjoining land in the parishes of *S.* and *B*, in the same county, which was thrown into *A.* farm, and occupied therewith, and the whole thenceforth called *A.* farm. By his will, made in 1817, he devised all his estate, consisting of *A.* farm, in the parish of *R.*, in the county of *H.*, to trustees:—

Held, that the lands in the parishes of *S.* and *B.* did not pass by the specific devise.

BY indenture in November, 1802, reciting an indenture of April, 1799, certain hereditaments described as *Aukley House, alias Arkley Hall,* and several pieces of land, containing about 111 acres, all situate in the parish of *Ridge*, in the county of *Herts,* were conveyed to *William Dodds* in fee. In the indenture of 1779, the lands were described as belonging to *Arkley Hall.*

In March, 1813, seven other pieces of land, containing about 40 acres, situate in the parish of *Shenley,* in the same county, were conveyed to *William Dodds* in fee; and in December, 1815, in consideration of the sum of £230, the Commissioner appointed to carry out an Act of Parliament for enclosing lands in the parish of *Barnet,* in the same county, by his certificate declared that three

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parcels of waste land, containing about four acres, situate in that parish, had become vested in *William Dodds* and his heirs. By his will, dated the 12th of August, 1817, *William Dodds* devised all his freehold estates, consisting of "*Arkley Hall Farm*, in the parish of *Ridge*, in the county of *Hertford*," and other estates, unto trustees, as to his said farm, called *Arkley Hall Farm*, upon trust to permit his son, *Thomas William Dodds*, to receive the rents during the minority of his grandson, *William Dodds*, and after he should attain the age of twenty-one years, then upon trust for him and his assigns for his life, and after his death upon trust for all his children equally, as tenants in common absolutely. The testator gave all his residuary estate upon trust for his son, *Thomas William Dodds*, for life, and after his decease upon trust for all *Thomas William Dodds*' children equally. By a second codicil (which was not executed in the manner required by law to pass real estates) the testator declared that his grandson, *William Dodds*, should share with the other children of *Thomas William Dodds* in the residuary estate, notwithstanding he was to have *Arkley Hall Farm*.

The testator died on the 16th of December, 1817. The Plaintiff in the first suit, *Samuel Pedley*, was the surviving trustee and executor, appointed by the second codicil to the will of the testator. *Thomas William Dodds* died on the 5th of December, 1831. *William Dodds*, the grandson, attained the age of twenty-one years on the 10th of January, 1835, and died on the 26th of June, 1851. The Plaintiff, *Samuel Pedley*, in consequence of the conflicting claims of the persons interested under the specific and residuary devises, could not administer the trusts; and by his bill, filed in February, 1865, he prayed that they might be performed under the direction of the Court, and that the rights of all persons under the will in the hereditaments described and devised as *Arkley Hall Farm*, in the parish of *Ridge*, might be ascertained; and for consequential relief.

In April, 1865, the suit of *Dodds* v. *Pedley* was instituted. The bill alleged that the parcels of land in the parish of *Shenley*, purchased by the testator in 1813, immediately adjoined and were added by him to his farm and closes in the parishes of *Ridge*; and that the said premises in the parishes of *Ridge* and *Shenley*, from that time,

during the remainder of his life, formed one farm, and were from time to time let by him to the same tenant at an entire rent, and were always enjoyed and occupied together as one farm by *William Dodds* as his tenant, and were, during that period, always known and included by and under the common name of the *Arkley Hall Farm;* and it was also alleged that the three pieces of waste land purchased in 1815 were added to the *Arkley Hall Farm*, and during his life were occupied and enjoyed together by *William Dodds*. From the death of the testator, in 1817, to the present time (April, 1865), the closes of land in the three parishes had continued to form and to be occupied and enjoyed together as one farm under the name of *Arkley Hall Farm*.

The children of *William Dodds*, who died in 1851, claimed to be entitled, under the specific devise, to the whole of the property in *Ridge*, *Shenley*, and *Barnet*, and their bill prayed for a declaration to that effect.

There was no documentary evidence, but the evidence on the part of the children of *William Dodds* was to the effect that, from the death of the testator, the closes of land and premises in the three parishes were occupied and enjoyed together as one farm under the name of *Arkley Hall Farm*, and that it had always been admitted, as well on the part of the several persons for the time being entitled to the residuary estate comprised in the will, as of the trustees or trustee of the will for the time being, that the whole of the closes of land and premises formed together one farm at the date of the testator's will, and passed under the specific devise of the *Arkley Hall Farm* therein contained; and it was further alleged that no claim to any part of the farm, or of the rents or profits thereof, was ever made by or on behalf of any of the persons entitled to the testator's residuary estate until about the year 1863. There was also evidence that the lands in *Shenley* had been formerly known as "*South Sea Lands*."

Mr. *Druce*, for the Plaintiff *Pedley*, stated the facts.

Mr. *Bacon*, Q.C., and Mr. *Hanson*, for the Plaintiffs in the second suit:—

The question is simply one of parcel or no parcel. If the

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testator had not added the words "in the parish of *Ridge*," there would have been no difficulty. The testator called his estate *Arkley Hall*, and his description of it as being in the parish of *Ridge* was erroneous. There are no words in the will under which anything which could be called *Arkley Hall*—and which comprised the whole farm in the three parishes—could be properly excluded from the specific devise. The words "in the parish of *Ridge*" are merely words of description, and may be excluded from the will, as in fact *Arkley Hall Farm* did include the lands in *Shenley* and *Barnet*.

[They cited *Webber* v. *Stanley* (1); *Doe* d. *Beach* v. *Jersey* (2); *Goodtitle* d. *Radford* v. *Southern* (3); *Down* v. *Down* (4); *Harrison* v. *Hyde* (5); *Cunningham* v. *Butler* (6).]

Mr. *Malins*, Q.C., and Mr. *Surrage*, for Defendants in the same interest, submitted that, as the description of the property was sufficient to pass it, the mere circumstance that there was an additional description could not prevent the specific devisees from taking that which was clearly intended for them. It was important to observe that part of the description was "in the county of *Herts*," and that all the three parishes were in that county.

Mr. *Greene*, Q.C., Mr. *Joshua Williams*, Q.C., and Mr. *Blackmore*, for the residuary devisees:—

The well-established rules of law applied to this case will prevent any difficulty arising. There is no documentary evidence to shew what lands were called *Arkley Hall Farm*, but there is evidence that the lands in *Shenley* were called *South Sea Lands*. There are lands which answer the description in the will, and the Court cannot go beyond that description. The cases illustrate the principle, perfectly well established, that if lands be found to satisfy the description, there is no error to rectify. The declaration which the residuary devisees ask for is, that the lands in *Shenley* and *Barnet* passed under the gift to them, and did not

(1) 16 C. B. (N.S.) 698.
(2) 1 B. & A. 550.
(3) 1 M. & S. 299.
(4) 7 Taunt. 343.
(5) 4 H. & N. 805.
(6) 3 Giff. 37.

pass under the devise of *Arkley Hall Farm;* also for an account of the rents and profits since the year 1859.

[They referred to *Welby* v. *Welby* (1); *Oxenforth* v. *Cawkwell* (2); *Ricketts* v. *Turquand* (3); *Doe* d. *Oxenden* v. *Chichester* (4); *Bacon's* Law Tracts (5); *Webb* v. *Byng* (6).]

Mr. *Bacon*, in reply:—

The fact that the lands in *Shenley* were formerly called *South Sea Lands* does not matter. The lands were one entire farm from the time when the testator bought them, and were so when he made his will, and the devise of *Arkley Hall Farm* cannot be cut down because the words "in the parish of *Ridge*" were unnecessarily added. It was a fallacious description to say "*Arkley Hall Farm*, in the parish of *Ridge*," for, as a matter of fact, it is in three parishes, and therefore the specific devisees are clearly entitled to the judgment of the Court.

SIR J. STUART, V.C.:—

Arkley Hall Farm in the parish of *Ridge* was a farm known by that description previously to 1802, when the testator purchased it. It is properly described in the will. The lands which the testator purchased in 1813, in the parish of *Shenley*, were known by the name of *South Sea Lands*. There can be no doubt that when the testator added the *South Sea Lands* to *Arkley Hall Farm*, and when he made his will, he knew that they were not in the parish of *Ridge*, but in that of *Shenley*. The testator specifically devised his *Arkley Hall Farm*, in the parish of *Ridge*, and it is contended that he made a mistake—that it was a false demonstration—that he did not mean *Arkley Hall Farm* proper, but meant that farm, not only in the parish of *Ridge*, but with the additions which he had made of land in the parish of *Shenley*. The Lord Chief Justice *Erle*, in *Webber* v. *Stanley* (7), said: "As to the case where there is property in respect of which all the facts of the description are found to be true, so that the property

(1) 2 V. & B. 187.
(2) 2 S. & S. 558.
(3) 1 H. L. C. 472—490.
(4) 4 Dow. 65.
(5) Rule 13, ed. 1737, p. 76.
(6) 1 K. & J. 580—585.
(7) 16 C. B. (N. S.) 752.

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exactly fits the description, the whole of that property, *and nothing more*, passes." What the testator has given is *Arkley Hall Farm*, in the parish of *Ridge*. By that description, a perfectly accurate one, there is property certainly known; but I am asked to decide that the testator, when he said "in the parish of *Ridge*," meant to include lands in another parish. The Law Tracts of Lord *Bacon* have been referred to by Mr. *Blackmore* in the course of his argument. Lord *Bacon* said:—

16 Eq 174.

"Though falsity of addition or demonstration doth not hurt, where you give the thing a proper name, yet nevertheless if it stand doubtful upon the words, whether they import a false reference and demonstration, or whether they be words of restraint that limit the generality of the former name, the law will never intend error or falsehood. Therefore if the parish of *Hurst* do extend into the counties of *Wiltsh.* and *Barksh.*, and I grant my close, called *Callis*, situate and lying in the parish of *Hurst*, in the county of *Wiltsh.*, and the truth is that the whole close lieth in the county of *Barksh.*, yet the law is that it passeth well enough, because there is a certainty sufficient in that I have given it a proper name which the false reference doth not destroy, and not upon the reason that these words, "in the county of *Wiltsh.*," shall be taken to go to the parish only, and so be true in some sort, and not to the close, and so to be false. For if I had granted *omnes terras meas in parochia de Hurst, in com. Wiltsh.*, and I have no lands in *Wiltsh.*, but in *Barksh.*, nothing had passed. But in the principal case, if the close called *Callis* had extended, part into *Wiltsh.* and part into *Barksh.*, then only that part had passed which lay in *Wiltsh.*"

The case put in the last lines of this passage is this very case without any distinction. Assuming that you may properly call the lands in the parish of *Shenley* part of the *Arkley Hall Farm*, yet the devise being of the farm in the parish of *Ridge*, you cannot exceed the bounds of that parish. The efforts made to extend the words of the testator beyond that clear and precise degree of expression which he has given, entirely fail in shewing that the testator's words are in any respect fallacious or mistaken; and I cannot say that he made any mistake, or intended to give more than he has

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expressly given. I have no warrant for saying that a single acre or rood of land passed by this devise other than the lands in the parish of *Ridge*, and therefore the declaration will be, that the lands in the parishes of *Shenley* and *Barnet* passed under the residuary clause, and not under the specific devise in the will.

The second suit of *Dodds* and *Pedley* was needlessly instituted, and therefore that bill must be dismissed, and the costs of it be paid by the Plaintiffs; but as the evidence has been used in both suits, it must be treated as evidence in *Pedley* v. *Dodds*, and the costs of the evidence must be costs in that suit; but I will not determine until the hearing, on further consideration, which must be reserved, how the costs are to be borne. There must be an account of the rents and profits since the year 1859, and the motion of the Defendants, in *Pedley* v. *Dodds*, to admit further evidence, must be refused with costs.

Solicitor for *Samuel Pedley*: Mr. *J. Pedley.*
Solicitors for Specific Devisees: Messrs. *Taylor, Mason, & Taylor.*
Solicitor for Residuary Devisees: Mr. *Thomas Braithwaite.*

CARINGTON *v.* WYCOMBE RAILWAY COMPANY.

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July 14, 16.

Lands Clauses Consolidation Act, 1845, *s.* 128—*Surplus Lands—Right of Pre-emption "Town"—Borough Boundary.*

The right of pre-emption of superfluous lands under the 128th section of the *Lands Clauses Consolidation Act*, 1845, is not confined to the proprietors from whom the company purchased, but devolves to future proprietors of the lands from which the purchased lands were severed:

The words, "lands situate within a town," in the same section, mean lands surrounded by the buildings which constitute the town; and therefore lands outside those buildings, although within the borough boundary, are not within the exception of the section, and the fact that a cottage stood upon a field, part of such superfluous lands, *held* not to bring them within the exception of "lands built upon, or used for building purposes."

5 Jur 106
12 Ch D 4
20 Ch D 4
435

Affd 3 Ch. 377

IN 1833, *John Abel Smith* and three others purchased of certain trustees a mansion house called *Castle Hill*, with the gardens, pleasure grounds, and lands belonging thereto, containing in the

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whole about ten acres, situate on the north side of the town, and in the parish of *Chipping Wycombe;* and also a cottage, in the occupation of a tenant, with coach-house, stable-yard, garden, shrubbery, and slip of meadow land held therewith, situate in the same parish, and at the south-east corner of the *Castle Hill* estate. These premises were conveyed to the *Smiths* and their heirs as tenants in common.

The Defendants, the railway company, were incorporated by an Act passed in 1846, but further works were authorized by an Extension Act passed in 1857, and with which was incorporated the *Lands Clauses Consolidation Act,* 1845.

In 1859, alleging that they required portions of these lands, *viz.,* 2A. 2R. 19P., for the purposes of their railway and works, the company served the *Smiths* with a notice to treat. The purchase-money was ascertained by arbitration, and the title having been accepted, the conveyance of these lands was effected by three separate deeds, dated the 26th of February, 1862.

The question which arose was in reference to three parcels of land, containing 1A. 0R. 27P., situate on the south side of the railway, which were conveyed in fee to the company for £700, being in full satisfaction and compensation for all damages for severance from and injury to the adjoining lands. The premises comprised in the deed included a cottage. It was agreed between the parties to the deed that it was intended to operate and take effect as a conveyance of the premises as near to the form in Schedule A. to the *Lands Clauses Consolidation Act,* 1845, as the circumstances of the case would admit, and also in every other mode in which the same might operate and take effect, independently of that Act. The deed neither expressly, nor by implication, conveyed or released any right of pre-emption reserved to the vendors by that Act, and such right was not, as alleged, included in the purchase-money.

The railway and works were completed and opened for public traffic, but with the exception of three perches no part of these three parcels of land was required for them.

On the 21st of July, 1864, the *Smiths* conveyed all the premises comprised in the purchase by them in 1833, except such portions as had been conveyed to the company, to *H. R. Freshfield* and his

heirs to certain uses for the benefit of the Plaintiffs for life and in remainder; and they charged that on the true construction of the 128th section of the *Lands Clauses Consolidation Act*, 1845, which enacted that "before the promoters of the undertaking dispose of any superfluous lands they shall, unless such lands be situate within a town, or be lands built upon, or used for building purposes, first offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed," they were entitled to have the lands not required by the company first offered to them before they were conveyed to any third person. The Plaintiffs' solicitors, in November, 1864, wrote to the solicitors of the company, stating that the Plaintiffs had been informed that the lands in question were not required by the company, and that they were prepared and desired to purchase them, and requested to know the price. The reply was that these lands had been conveyed by the company to the Defendant *Terry*. The Plaintiffs subsequently ascertained that such conveyance, though not executed until the 4th July, 1864, was made in pursuance of a contract entered into between the company and the father of the Defendant *Terry*, in October, 1858, before the notice to treat was served upon the *Smiths*. The deed of covenant, dated the 23rd October, 1858, and executed by the company, witnessed that in consideration of £20,000 New 3 per Cents. being forthwith transferred to the company to enable them to purchase the lands which they required, they would charge the same with the payment of a rent charge of £800 a year; and as soon as they should be in possession and legally entitled to deal with the lands, being part of *Castle Hill*, and lying between the property of *Terry* and the railway, they would convey the same to him in fee, and that until the possession could be delivered to *Terry*, the company would pay him the further sum of £50 a year, and would also make upon these lands a siding and a junction with the railway, for the receipt and delivery of minerals and other articles. The Defendant *Terry* had succeeded to the property and rights of his father in respect of these lands.

The solicitors and surveyor of the company were also the solicitors and surveyor of *Terry*. In a subsequent letter, the Defendants' solicitors reminded the Plaintiffs' solicitors that the

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right of pre-emption did not arise in this case, as the lands were situate in a town, or built upon, or used for building purposes, and therefore came within the exception in the Act.

The Plaintiffs charged that these lands were not within the exception, but that in fact they were situate without the town of *Wycombe*, and were divided therefrom by agricultural land belonging to *Terry*, and that, excepting the cottage, there was not in February, 1862, any building on the lands, and that such cottage and lands were beyond the point to which the rows of houses forming the town extended.

The land conveyed to *Terry*, who had had express notice of the Plaintiffs' claim, remained in the same state as when so conveyed by the company. The Plaintiffs charged that these lands were never *bonâ fide* required by the company for the purposes of their undertaking, but were purchased by them under colour of their parliamentary powers for the express purpose of being re-sold to *Terry;* and they prayed for a declaration that they were entitled to have these lands first offered to them before the same were conveyed to *Terry;* and that the Defendants might be directed to convey the lands to uses for their benefit, they being willing to pay the purchase-money paid by *Terry* to the company, or a price to be ascertained by arbitration. The company, by their answer, stated that these were lands built upon, and also that part of them was situate within the parish and boundary of the borough, and was charged with the rates for paving and lighting the town, and with other borough rates; and they submitted that these lands ought to be deemed to be situate within the town and borough, and therefore not within the 128th section. Further, that the price paid by the company was £450 an acre, the price of building land; agricultural land being only worth about £200 an acre.

The company admitted that the mansion house and shrubbery were outside the boundaries of the town and borough, and also that part of the lands of the *Castle Hill* estate, lying on the south side of the mansion house, was within them, and that there were no intervening lands between them and the mansion house.

The evidence as to whether the company took the lands compulsorily under the powers of their Acts, or purchased it by agreement voluntarily entered into with the *Smiths*, was conflicting.

The evidence on the part of the Plaintiffs, in reference to the boundaries of the town and borough, and the position of the lands, showed: "That the town of *Wycombe* is an ancient corporate borough, and that the boundary of the borough runs through the *Castle Hill* estate, and that the lands in question are within the parish of *Wycombe*, and partly within and partly outside the borough. The town consists mainly of one principal street, called *High Street*, in which there are continuous rows of houses on each side. A road diverges from *High Street*, near the centre of the town, and is the highway from *Wycombe to Amersham*. At a point on the *Amersham Road*, about 140 yards from the *High Street*, a road diverges on each side, and to that point there is a continuous line of houses on each side of the road; but beyond that point there are no houses on either side next the road for upwards of a mile, except a cottage, which is part of the *Castle Hill* estate, and a toll-gate house, and one labourer's cottage. The road on the east side of the *Amersham Road* leads to the railway station, and there are houses built on the south side of this road. The road on the west side of the *Amersham Road* is a footpath leading to *Wycombe Church*, and a cart-road leading into the Defendant *Terry's* premises. The gardens of the houses on the north side of the *High Street* reach to the south side of this footway, and there are no houses built next the footway. The land lying between the footpath and the railway consists partly of land belonging to *Terry*, and partly of the land in question. On *Terry's* land there are some farm buildings and a cottage."

The evidence on the part of the Defendants was to the effect that all the lands in question, exceptign about twenty perches, were within the town and borough, and chargeable with the rates for paving and lighting the town, and also with borough rates; that in settling the amount to be paid by the company, the lands were treated, partly as lands built upon, and partly as lands adapted for building purposes, in consequence of its abutting on the road leading to *Amersham*, and being within the town; that the sum paid was very much more than the value of the land for agricultural purposes; that before the time of negotiation for the purchase, it had been arranged between the company and *Terry*, that if the company did not require the lands in question for their railway,

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they would convey it to *Terry*, on the understanding that he should make a new road through them and his own lands to the railway station, for the purpose of making a better approach; that the road was laid out, and but for this suit, would have been completed; and that the Defendant *Terry's* lands within the town and adjoining the lands in question, had been offered for sale for building purposes.

Mr. *Malins*, Q.C. (with him Mr. *Kekewich*), for the Plaintiffs:—

The simple object of this suit is to establish the Plaintiffs' right to re-purchase the property acquired by the railway company; but not required by them for the purposes of the railway and works. The Defendants must show that these lands were necessary for that purpose: *Eversfield* v. *The Mid-Sussex Railway Company* (1), afterwards affirmed (2); but the evidence shews that these lands were clearly not necessary for any such purpose; and also, that they are not within the exception in the 128th section of the *Lands Clauses Consolidation Act*. These lands were acquired by the company by a misrepresentation, for instead of being required for the railway, they were conveyed to *Terry* in pursuance of a covenant which had reference to financial arrangements with him. Such a contract was an abuse of the company's powers.

Mr. *Bacon*, Q.C., and Mr. *Speed*, for the Defendants:—

The company acted in good faith, for they wanted these lands for the purpose of the railway and works. They had a right to acquire possession of them. The transaction with *Terry* must be examined by itself. When the company contracted to purchase from the *Smiths*, it was considered that if only a part of these lands should be necessary, it would be better to take the whole, in order that a new road might be made, and for accommodation works. The 128th section of the *Lands Clauses Consolidation Act* is a complete answer to the Plaintiff's demand, for whatsoever test is applied, these lands must be considered as being within the town and borough, and also, that they are suitable for, and may be used for building purposes. Further, as the right of pre-emption is given to

(1) 1 Giff. 153. (2) 3 D. G. & J. 286.

the "then" owners, the *Smiths* are the only persons who can enforce that right, against either the company or *Terry*. If a company fraudulently acquire possession of lands for alleged railway purposes, for which they are really not required, this Court will interfere. That is not this case, for *Terry* was to make a new road for railway purposes, and the company have a right to compel him to perform his agreement. The ten years given to the company before they can be required to sell their surplus lands will not expire till 1867. It is clear from the way in which the agreement between the *Smiths* and the company was prepared, that it was intended that the right of pre-emption given to vendors by the *Lands Clauses Consolidation Act*, should not arise. The suit is a frivolous and unreasonable one, and ought to be dismissed with costs.

Mr. *Greene*, Q.C., and Mr. *Jemmett*, for the Defendant *Terry*:—

A public body may take more lands than are absolutely necessary for making a contemplated improvement: *Galloway* v. *The Mayor and Commonalty of London* (1). In *The Stockton and Darlington Railway Company* v. *Brown* (2), it was held that a company might take the lands specially described, and use them for the purposes authorized by their Act. The *Wycombe Railway Company* sold this surplus land to *Terry*, on an agreement that a road and accommodation works for the railway should be made by him. The agreement between the company and *Terry* was entered into in good faith, and can be enforced.

That these lands are within the town, there can, on the evidence, be no doubt. *Wycombe* is a municipal and parliamentary borough. The occupier of the cottage purchased and taken down by the company, was a burgess, and paid borough rates. The only boundary that can be considered as comprehending the town is that of the borough. In *Elliott* v. *South Devon Railway Company* (3), it was held that "town" means a collection of houses so near to each other, that they may reasonably be said to be continuous, and the term will include a space of open ground surrounded by continuous houses: *The Queen* v. *Cottle* (4).

(1) Law Rep. 1 H. L. 34.
(2) 9 H. L. C. 246.
(3) 2 Ex. 725.
(4) 16 Q. B. 412.

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Blackstone says (1): "town" comprehends under it the several species of cities, boroughs, and common towns, and that a "borough" that sends burgesses to parliament is now understood to be a town, either corporate or not, therefore, it seems that the houses need not touch each other, but that it is sufficient if they are within the ambit of the borough.

[*Johnson's* and *Richardson's* dictionaries, "borough," "city," and "town," and *Litt.*, section 164, were also referred to.]

But it is further submitted that the language of the 128th section of the *Lands Clauses Act*, "lands situate within a town," must mean something different from "lands built upon," and though these lands be not built upon now, this section must be understood to apply to the state of the property at the end of the ten years, when the Defendants would, but for this suit, have the benefit of the new road and accommodation works. The conveyance by the *Smiths* to the company was executed subsequently to the agreement with *Terry*, but there is no allegation in the bill that that agreement was not known, as it must have been, to the *Smiths*.

SIR JOHN STUART, V. C.:—

The substance of the bargain with *Terry* was, that he should advance £20,000 to the company, and receive an annuity of £800, and also receive £50 a year from the company until they conveyed the lands not required by them for the purposes of their Act. Considering the enormous powers conferred by the Legislature upon railway companies, in enabling them to compel proprietors to part with their lands, it is the duty of the Courts to see that these powers are scrupulously exercised, and that companies do not go beyond the powers which have been granted to them.

If a railway company, before they serve a notice to treat for lands, enter into a bargain to sell to a third person a part of those lands, in order to make a profit by the transaction, that seems to be a fraud upon the Act of Parliament by which the powers are conferred.

The present case raises the question, whether, under the 128th section of the *Lands Clauses Consolidation Act*, these lands

(1) 1 Com. p. 114, by Hargrave.

were superfluous lands, and not required for the purposes of the railway, and therefore lands in respect of which a right of pre-emption arises in favour of the present Plaintiffs. It has been contended, that, as the present Plaintiffs are not the persons from whom the company purchased these lands, no right of pre-emption in them exists in the Plaintiffs. But upon the construction of this section the right of pre-emption is not confined to the persons from whom lands are taken, and who were served with the notice to treat, but devolves on the proprietors for the time being, who have, by transmission, the adjoining lands. The words of the section are, "shall first offer to sell the same to the person *then* entitled to the lands (if any) from which the same were originally severed," and the present Plaintiffs are the persons entitled to those lands.

Then it was contended that the right of pre-emption does not arise, because these lands come within the exception in the section, as being "lands situate within a town, or lands built upon or used for building purposes." The meaning of these words in reference to the purpose they were intended to serve seems plain.

As to lands really "within a town," no right of pre-emption without inconvenience could probably be enforced, nor do I think that any proprietor would desire to exercise that right. Notwithstanding all that has been quoted, and very properly, by Mr. *Jemmett* from *Blackstone's* Commentaries, and the dictionaries to which he has referred, the language of the section must be construed in its plain and ordinary sense, and the question is, whether according to such a construction these lands are situate "within" the town of *High Wycombe*. From the force of the expression "within a town," the lands must not be outside but within the compass of the buildings which constitute the town. If these lands are outside the town (that word being considered in its ordinary and popular sense), and are not necessary for the purposes of the railway, the Plaintiff will be entitled to re-purchase them upon fair terms.

It was said that these lands are within the boundary of the borough, and no doubt that boundary-line passes through part of them, but that in my opinion is not enough to shew that they are within the town. If the words of the act had been "within the

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borough," it would be a different thing. The word "borough" occurs in the interpretation clause of the *Lands Clauses Consolidation Act*, but it is carefully excluded from the 128th section, and the word "town" is used. I am of opinion that these lands, attached as they were to the *Castle Hill* mansion, are shewn to be outside of the town of *High Wycombe*, and not within it. Then it was contended, that because there was a cottage upon these lands, they were built upon, or may be used for building purposes. But when the building existed these lands were occupied for agricultural purposes, and in my opinion this contention fails.

Declare that the Plaintiffs are entitled to pre-emption, with consequential directions according to the Act of 1845; that the conveyance by the company to *Terry* must be set aside, and that all necessary parties must concur in a conveyance to the Plaintiffs, or to their use, and that the Defendants must pay the costs of the suit.

Solicitors for the Plaintiff: Messrs. *Freshfields & Newman.*
Solicitors for the Defendants: Messrs. *Baxter, Rose, Norton & Co.*

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DEWAR *v.* MAITLAND.

Will, inoperative in St. Kitts—Heir—Election—Trustee Act, 1850.

A will, attested by two witnesses, contained a devise of freeholds in *England* to *A. D.* (the testator's son and heir) for life, with remainder to trustees, and a devise to them of estates in *St. Kitts* upon trust to sell and to invest the proceeds in estates in *England*, to be held upon the same trusts. *A. D.* was in possession of the English, and he received the rents of the *St. Kitts* estates during his life; and, with his concurrence, the trustees made efforts—though ineffectual—to sell the latter. After the death of *A. D.*, intestate, the trustees contracted to sell one of the *St. Kitts* estates, but the purchaser refused to complete, on the ground that the will was inoperative in the island, and that the estates descended upon the heir:—

Held, that *A. D.* had elected to take under the will, and that his infant heir was bound by his acts, and was a trustee under the Act of 1850, for the person claiming under the will.

DAVID ALBEMARLE BERTIE DEWAR, by his will, dated the 12th of January, 1857, which was executed by two witnesses, after appointing executors and trustees, bequeathing a legacy of

£3000 to his son *Albemarle Dewar*, and making other bequests, devised his real estate in *Hampshire* unto his son *Albemarle Dewar* for life, or until he should become bankrupt or insolvent under any Act of Parliament, or execute any assignment, mortgage, charge, or incumbrance, or do any act whereby his interest in such estate, or the rents and profits thereof, would become vested in any other person, and from and after the occurrence of any such act, he devised his estate in *Hampshire* unto trustees upon trust to apply the rents for the benefit of his said son, and of his wife and children, in such manner as his trustees should in their discretion, during his said son's life, think proper; and from and after the death of his said son, (after paying £300 a-year to his widow) they were to hold the estate to the use of his son's first and other sons in tail male. There were limitations over in case of default of issue, and powers to the tenant for life of appointment and leasing. The testator devised all the residue of his real estate, including his property in the *West Indies*, unto his trustees upon trust to sell, and to invest the proceeds in the purchase of real estate in *England* or *Wales*, to be held with his estate in *Hampshire*, and to be settled upon such of the trusts concerning that estate as should be subsisting. Until the residuary real estate should be sold the trustees had full power to manage it, and they were authorized to suspend the sale of the residuary estate so long as they should in their discretion think fit, and until the sale thereof the residuary estate was to be held upon the trusts above mentioned.

The testator died in November, 1859, leaving *Albemarle Dewar*, his only son and heir-at-law according to the law of *England*, and to the law of the island of *St. Kitts*, where the testator's *West India* estates were situate, which together produced about £280 a-year, and were estimated to be of the value of not more than £5,300. The gross annual income of the *Hampshire* estate was about £800.

Albemarle Dewar, upon the death of his father, entered into, and during his life continued in the possession of the *Hampshire* estate, and the trustees paid the income from the *West India* estates to, or permitted him to receive it during his life.

The trustees with the concurrence of *Albemarle Dewar*, and in execution of the trusts, made divers efforts to sell the *West India*

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estates (*Albemarle Dewar*, in his correspondence, urging that the price ought not to be less than £6000), but they were not successful.

Albemarle Dewar died in June, 1862, intestate, and (as alleged) practically insolvent, leaving five children, three daughters and two sons, and his widow him surviving. The trustees, in June 1863, entered into a contract for the sale of the larger of the *West India* estates, but the purchaser refused to complete his purchase, on the ground that the will of the testator was inoperative to pass those estates; that they descended upon his son *Albemarle Dewar* as his heir-at-law, and that upon his decease in June, 1862, they again descended upon his eldest son and heir-at-law, the Defendant *Albemarle Willoughby Dewar*.

The Plaintiffs, the four infant children of *Albemarle Dewar* other than his eldest son, prayed for declarations that their father elected to take the *West India* estates under the devise thereof; that their brother was a trustee of those estates within the meaning of the *Trustee Act*, 1850, and that a fit and proper person might, under sections 20 and 30 of that Act, be ordered to convey those estates to the trustees, to be held by them upon the trusts of the will, and for other relief in case the Court should be of opinion that *Albemarle Dewar* did not so elect.

Mr. *Bacon*, Q.C. (with him Mr. *F. J. Wood*), for the Plaintiffs, submitted that *Albemarle Dewar* was bound to elect to take either under or against the will of his father; that in fact he did, by his acts in receiving the rents, and in concurring with the trustees in their efforts to sell, elect to take the *West India* estates as tenant for life, and not as heir-at-law; that he thereupon became a trustee of those estates for the purposes declared by the will of his father, and that, therefore, his infant son and heir was bound by such election, and was also a trustee of the estates within the meaning of the *Trustee Act*, 1850.

They were stopped by the Court.

Mr. *Greene*, Q.C., and Mr. *O. Morgan*, for the infant heir-at-law:—

The infant was not bound by the acts of his father. The testa-

tor's will not having been attested by more than two witnesses, was, as to the *West India* estates, an unattested instrument, and therefore absolutely void, and being void the heir could not have been compelled to elect; but, in fact, no question of election arose, for the infant's father was entitled to the English estate under the devise, and to the *West India* as heir-at-law: *Hearle* v. *Greenbank* (1); *Dillon* v. *Parker* (2); *Boughton* v. *Boughton* (3); *Sheddon* v. *Goodrich* (4).

In *Brodie* v. *Barry* (5), an heir-at-law in *Scotland* being a legatee of personal property in *England*, was put to election; but though the will was not executed so as to pass the real estate in *Scotland*, it was read for the purpose of discovering in it an implied condition concerning the real estate. That case was distinguishable from the present. Election depends upon the intention of the testator, and intention cannot be collected from a will not properly executed. [*Gardiner* v. *Fell* (6); *Churchman* v. *Ireland* (7); *Maxwell* v. *Maxwell* (8); and *Edwards* v. *Morgan* (9), were also referred to.]

If the heir had, through a mistaken view of his rights, elected, the Court would have held that it was no election. If the devisee was not bound to elect, the Court could not make him do so, and it would not infer from his acts that he had elected.

Mr. *F. O. Haynes*, for the Defendant, the widow, also submitted that the son did not elect. He did not know what his rights were; but he assumed that the *West India* property passed under the will. He was not at all aware of the state of the law in *St. Kitts*. The *onus* was upon the other side, to show that the son of the testator had full knowledge of all the circumstances of his position, and in respect of his property, before it could be held that he elected; but the evidence only went to show that he was higgling with the trustees for a higher price: *Padbury* v. *Clark* (10).

(1) 3 Atk. 695—714.
(2) 1 Sw. 359, 405, *n.* and see the cases there cited.
(3) 2 Ves. Sen. 12—15.
(4) 8 Ves. 481.
(5) 2 V. & B. 127—130.
(6) 1 Jac. & W. 22.
(7) 1 Russ. & My. 250.
(8) 2 D. M. & G. 705.
(9) 13 Price, 782.
(10) 2 Mac. & G. 298.

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In order to presume an election from the acts of any person, that person must be shewn to have had full knowledge of all the requisite circumstances, as to the amount of the different properties, and his own rights in respect of them. The receipt of the rents and profits of both properties cannot be held an election to take one and reject the other: *Jarman* on Wills (1); *Cary* v. *Askew* (2); *Dundas* v. *Dundas* (3); and *Middlebrook* v. *Bromley* (4).

The Court has no jurisdiction over the *West India* estates, or if it has, it is only in dealing with it in the course of administration, and in doing that the Court must respect the rights of the heir as much as it would those of an English heir.

Mr. *Buxton,* for the trustees.

SIR JOHN STUART, V. C.:—

In this case the heir enjoyed the whole of the property according to the terms of his father's will, and upon the evidence, which supports the allegations in the bill, it is, I think, beyond a doubt, that he recognised as valid the devise of the *West India* estates, and enjoyed all the benefits arising from all the estates upon that footing. It has, however, been contended, that no election has been made unless it be shewn that the heir knew that the will was invalid, and knew that if he chose he could have defeated its operation, and could have enjoyed the *West India* estate as heir.

There is no doubt that before an heir can be put to election, he is entitled to know everything which concerns the situation and the value of the property in reference to which he may be required to make the election; but there is no authority for the proposition that where an heir has chosen deliberately to confirm a devise of lands, which without his confirmation would be invalid, there must be, in order to enable the Court to hold that those claiming under him are bound by his confirmation, some distinct evidence of his knowledge of his rights. Although the Court compels persons to elect, yet election itself is a voluntary act. The doctrine has been established for the peace of families and of the public, that if pro-

(1) Vol. i. p. 441.
(2) 1 Cox, 241.
(3) 2 Dow. & Cl. 349.
(4) 9 Jur. (N. S.) 614.

perty, has been long enjoyed according to a certain mode and rights, this Court will be very slow to disturb such enjoyment. The heir in this case chose to enjoy the property devised by his father—whether properly devised or not—and upon the footing of his will. The arguments have been upon cases in which this Court has compelled heirs to elect; and, accordingly, the well-established doctrine of the Court, that an heir, where the will or codicil is unattested, will not be put to his election, has been commented upon. But although the authorities shew that that is so, as to an heir of English freeholds, yet it does not apply to an heir of copyholds, or to an heir of Scotch estates. Then, if that be so, upon what ground can I hold that an heir of colonial estates is not to be put to his election?

Declare, that having regard to the acts and conduct of *Albemarle Dewar*, he must be held to have elected to take the estates in the colony of *St. Kitts* under the will of his father, and that his infant heir cannot claim as against the dispositions made by that will; also that the infant heir is a trustee under the *Trustee Act* of 1850, and that Mr. *Cholmeley* be appointed to convey to the purchaser the property sold to him.

Solicitors: Messrs. *Frere, Cholmeley & Forster.*

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Held, that there had been no ademption, and that the specific legatee was entitled. *Jenkins* v. *Jones* 323

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Held, an execution of the power. *Attorney-General* v. *Wilkinson.* 816

APPORTIONMENT.

The *Apportionment Act* applies either where the instrument creating the life interest, or where the lease in respect of which the apportionment arises, bears date after the statute.

Accordingly, where a lease was granted after the passing of the Act under a power in a settlement executed prior to the Act:—

Held, that the rent reserved by the lease was apportionable between the tenant for life and remainderman under the settlement. *Llewellyn* v. *Rous.* 27

APPROPRIATION OF CONSIGNMENTS TO BILLS.

A manufacturer, *A.*, proposed to a firm of *B. & C.*, who were the home agents of *A.'s* foreign consignees, that they should make advances to him against the consignments, and that "the proceeds of sales, above the advances," should go to the liquidation of an old claim of *B. & C.* against *A.*

B. & C. assented to this arrangement by a letter which, after stating

that there were two ways of making advances—one for *A.* to draw on *B. & C.*, and take their acceptances, and negotiate them; the other for *B. & C.* to advance cash to *A.*, and draw on *A.* for the amounts, *A.* to accept, and *B. & C.* to negotiate—concluded thus: "and we shall retire that acceptance from proceeds of the sales."

In pursuance of this arrangement, *A.* directed his consignees to remit to *B. & C.*, and *B. & C.* made advances to *A.* by drawing on him, negotiating his acceptances, and remitting the proceeds to him. Afterwards, *B. & C.*, being in want of money, directed the consignees to remit, not to themselves, but to a firm of bankers *C. & D.* (having a common partner with themselves), as a security for advances made by *C. & D.* to *B. & C.*

Upon *B. & C.* becoming bankrupt:—

Held, that *C. & D.* had notice of the arrangement between *A.* and *B. & C.*, through the fact of the common partner; and that, upon the construction of the contract, the remittances in the hands of *C. & D.* were appropriated in equity, first to the payment of *A.*'s acceptances, and subject thereto, to the discharge of the old claim. *Steele* v. *Stuart.* 84

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See COMPOSITION DEED.

ASSIGNMENT OF FUTURE FREIGHT.

See FREIGHT, ASSIGNMENT OF.

ATTESTATION BY LEGATEE.

See ERASURE IN WILL.

BANKER'S LIEN.

A. being indebted to bank *B.* for advances, handed to them certain marginal receipts of bank *C.* for 2000*l.*, representing deposits lodged there until advice of payment of certain bills on a firm at *Bombay*, and discounted by *A.* with that bank; the course of dealing being for bank *C.*, upon receiving the bills, to pay over to *A.*, or place to his credit in his banking account, less than the full discount value of the bills, retaining the difference as a security for payment in full at maturity of the discounted bills. When advised that the bills had been paid in full, the bank was in the habit of carrying over the retained margin to the credit of *A.* in his general banking account.

Notice of *A.*'s assignment of the marginal receipts was given by *B.* to *C.* on the same day that *A.*, who was largely indebted to *C.*, upon an overdrawn account, and upon contingent liabilities upon bills of exchange not then matured, suspended payment:—

Held, as between *B.* and *C.*, that *B.* was entitled to the 2000*l.* covered by the marginal receipts, subject only to a set-off of any sums actually due and payable to *C.* by *A.*, at the time when such marginal receipts became payable, upon liabilities contracted before notice was received by *C.* of the assignment to *B.*

Although the demand made by a Plaintiff may be too extensive, yet if the Defendants resist the demand *in toto*, they must pay the costs up to the hearing. *Jeffryes* v. *Agra and Masterman's Bank.* 674

BANKRUPTCY.

See APPROPRIATION OF CONSIGNMENTS TO BILLS.
SOLICITOR'S LIEN.
TRUSTEE ACT, 1850, 1.

BANKRUPTCY, ACT OF.

See POLICY.

BANKRUPTCY ACT, 1861,

SECTION 110.

See TRUSTEE ACT, 1850, 1.

SECTION 192.

See COMPOSITION DEED.

BANKRUPTCY, FORFEITURE ON.

See FORFEITURE.

BEQUEST AVOIDED BY FRAUD.

The income of property was given by a testator to a woman in the character of, and whom he described as his wife, but who, at the time of the marriage ceremony with him and at his death, had a husband living :—

Held, in respect of the fraud committed by her, that the bequest was void.

The testator bequeathed the residue of his property to his "step-daughter," the daughter of his supposed wife :—

Held, that the bequest was valid. *Wilkinson* v. *Joughin.* 319

BILL OF PEACE.

An Act of Parliament authorized the *Watermen's Company* to appoint watermen to ply on Sundays, within certain limits, from such common stairs or places of plying on the *Thames* as might be appointed, and provided that if any person except so appointed should ply for hire on Sundays from such appointed plying places, he should incur for each offence a penalty of 40*s*. The Act also provided for the leasing of the right to ply on Sundays at plying places, and that the profits or rent of the Sunday ferries should be applied for the relief of aged and sick watermen.

Upon bill by a lessee from the *Watermen's Company* of the right of plying on Sundays from certain stairs to a certain point across the river, claiming a right of ferry, and seeking to restrain a new ferry, which had been established fifteen yards from his ferry :—

Held, that if the Plaintiff had the right he alleged, he might come to the Court to quiet such right, and would not be left constantly to insist on the penalties imposed by the Act; and that the new ferry was so near the Plaintiff's that the Court would have restrained it; but that the Plaintiff's right relating only to Sundays, and he being under no obligation to keep up the ferry, but being free to abandon it at any time, his right did not stand upon the same footing as an ancient ferry. The Court, therefore, dismissed the bill with costs. *Letton* v. *Goodden.* 123

BILLS OF EXCHANGE, APPROPRIATION OF CONSIGNMENTS TO.

See APPROPRIATION OF CONSIGNMENTS TO BILLS.

BLANKS IN WILL.

Devise and bequest of real and personal estate in trust for all the testator's nephews and nieces, the sons and daughters of his sister *R.*, including who the illegitimate of the said *R.*, equally as tenants in common :—

Held, a good devise to the legitimate sons and daughters of *R.*, exclusive of

R.'s illegitimate children. *Gill* v. *Bagshaw.* 746

BORROWING POWERS.

See MISREPRESENTATION OF LAW.

BUILDINGS, REMOVAL OF.

See METROPOLITAN BUILDING ACT, 1855.

CAIRNS' ACT.

See DAMAGES.

CALL TO ADJUST RIGHTS.

See PAID-UP SHAREHOLDER A CONTRIBUTORY.

CASE FOR OPINION.

See PRODUCTION OF DOCUMENTS, 4.

CERTIFICATE.

See SOLICITOR, UNCERTIFICATED.

CHANCEL.

Upon bill filed to establish a right to a chancel as part of the parish church, against the lord of the manor, who claimed it as appendant to the manor or manor-house, it appearing that the chancel was an ancient chapel, coeval with the church; that it was a private chapel erected by the lord of the manor:—

Held, that immemorial use and occupation, coupled with reparation, entitled the lord of the manor by prescription to the perpetual and exclusive use of the chancel; and that this right might exist, notwithstanding that the freehold might not be in the person prescribing, and although the estate or house to which the chancel was appendant might not be situate in the parish. *Churton* v. *Frewen.* 634

CHARGE FOR PORTIONS.

See PORTIONS.

CHILDREN.

See GIFT BY A MOTHER TO CHILDREN "LEGITIMATE OR OTHERWISE."

CODICIL, WILL EXPLAINED BY.

Testator gave his residue among his nephews and nieces living at his death, and by a codicil gave £100 to a grandnephew (his executor), whom he called his nephew. By a second codicil, he declared that the £100 was given to him in addition to the share of residue given to him by the will, his intention being that he should receive first the £100, and then the share of residue:—

Held, that all grandnephews and grandnieces who were living at testator's death were included in the gift. *Weeds* v. *Bristow.* 333

COLLATERAL SECURITY.

See LOCKE KING'S ACT.

COMMON PARTNER.

See APPROPRIATION OF CONSIGNMENTS TO BILLS.

COMPANIES ACT, 1862.

See WINDING-UP, 2.

SECTIONS 35, 98.

See CONTRIBUTORY, 1.

SECTION 35.

See PROSPECTUS AND MEMORANDUM, VARIANCE BETWEEN.

SECTION 69.

See COSTS, SECURITY FOR.

SECTION 79.

See WINDING-UP, 1.

SECTIONS 85, 87, 162.

See EXECUTION AFTER WINDING-UP.

COMPANIES ACT, 1862—(*continued*).

SECTION 133, ART. 9.

See PAID-UP SHAREHOLDER A CONTRIBUTORY.

SECTION 153.

See CONTRIBUTORY, 2, 5.

COMPANY.

See CONTRACTOR'S PLANT, FORFEITURE OF.
CONTRIBUTORY, 1, 2, 3, 4, 5, 6.
COSTS, SECURITY FOR.
COSTS ON WINDING-UP PETITIONS, 1, 2.
EXECUTION AFTER WINDING-UP.
INJUNCTION, INTERLOCUTORY.
JURISDICTION.
LIMITATIONS, STATUTE OF, 3.
MISREPRESENTATION OF LAW.
PAID-UP SHAREHOLDER A CONTRIBUTORY.
PROMOTERS.
PROSPECTUS AND MEMORANDUM, VARIANCE BETWEEN.
PROSPECTUS, MISREPRESENTATION IN, 1, 2.
SHAREHOLDER, PREPONDERATING INFLUENCE OF.
WINDING-UP, 1, 2, 3.

COMPANY, DOCUMENTS IN POSSESSION OF.

See PRODUCTION OF DOCUMENTS, 2.

COMPOSITION DEED.

By a deed under s. 192 of the *Bankruptcy Act*, 1861, expressed to be made between a debtor of the first part, trustees of the second part, and the several other persons whose names and seals were thereunto subscribed and set, being creditors of the debtor, and all other persons creditors of the debtor of the third part, the debtor assigned his estate to the trustees upon trust to pay to the parties thereto of the third part the sums set opposite to their respective names in the schedule, subject to the covenant thereinafter contained for verifying the amounts thereof, such covenant being to the effect, that it should be lawful for the trustees to require the amounts of the debts to be verified by solemn declaration, or in such other manner as to the trustees should seem expedient; and in the event of a creditor failing or refusing so to verify his debt, such creditor was to be excluded from all benefit of the deed:—

Held, that the deed was not binding on a creditor whose name was not in the schedule, and who had not assented. *Hickmott* v. *Simmonds*. 462

CONCEALMENT OF PROMOTERS' AGREEMENT.

See PROMOTERS.

CONCISE STATEMENT.

See DOCUMENTS, AFFIDAVIT OF.

CONDITIONS IMPORTED INTO DEVISE.

See DEVISE, "SUBJECT TO THE SAME CONDITIONS" AS OTHER SHARES WHICH WERE SETTLED.

CONDITIONS OF SALE.

See EASEMENT.

CONFLICT OF LAWS.

See DOMICIL, 1.
FOREIGN GUARDIAN.

CONSIGNMENTS, APPROPRIATION OF, TO BILLS.

See APPROPRIATION OF CONSIGNMENTS TO BILLS.

CONSOLIDATED ORDERS.

X. r. 7.

See SERVICE OUT OF JURISDICTION.

XIV. r. 17.

See PLEA TO WHOLE BILL.

XXXV. rr. 33, 34.

See CROSS-EXAMINATION.

XL. r. 32.

See COSTS OF READING DEPOSITIONS TAKEN ABROAD.

CONTRACT.

See CONTRACTOR'S PLANT, FORFEITURE OF.

CONTRACTOR'S PLANT, FORFEITURE OF.

An agreement between a railway company and a contractor provided, that in case the contractor should be guilty of any delay or default in the fulfilment of the contract, the company might take the execution of the works out of his hand, and might use all or any of his plant, materials, or implements: and that in addition to all other rights and remedies which the company might have against the contractor, the company might apply any moneys to which the contractor would otherwise be entitled under his contract towards satisfaction of all losses or expenses occasioned to the company by the delay: and that all the materials, plant, and implements, which at the time of such delay or default should be in or about the site of the works, should thereupon become the absolute property of the company, and be valued or sold, and the amount of such valuation or sale credited to the contractor in reduction of the moneys (if any) recoverable from him by the company.

The company took the execution out of the contractor's hand under this clause. The contractor brought an action for breach of contract, which with all matters in difference between the parties was referred to arbitration:—

Held, that the plant and materials did not become the absolute property of the company unless loss or expense had been occasioned to them; and an interlocutory injunction was awarded to restrain them from removing and selling the plant and materials pending the arbitration. *Garrett* v. *Salisbury and Dorset Junction Railway Company.* 358

CONTRARY INTENTION.

See SPECIFIC LEGACY.

CONTRIBUTION.

See JURISDICTION.

CONTRIBUTORY.

1. In settling the list of contributories to a company which is being wound up, the Court is not bound by the register of shareholders; but has authority to rectify the register, and will determine the question who is in equity the real owner of the shares.

Where, therefore, the registered owner of certain shares sold them long before the date of the winding-up order, but in consequence of disputes between the purchasers, his name had not been removed from the register; the Court put the equitable owner of the shares on the list of contributories in the place of the registered owner. *In re London, Hamburg, and Continental Exchange Bank. Ward's Case.* 226

2. The advertisement of a Petition for winding-up a company is notice to all the world of the Petition; and a vendor of shares is bound to ascertain whether such an advertisement has appeared. Until the appearance of the advertisement, the shares may be dealt with as if no Petition had been presented, assuming such dealings to be strictly *bonâ fide.*

Under s. 153 of the *Companies Act*, 1862, the Court has a discretion to make valid all dealings with the shares

between the presentation of the Petition and the order for winding-up: and it will exercise such discretion in all cases of *bonâ fide* sales made previous to the advertisement of the Petition.

The Court will not appoint a provisional liquidator before the hearing of a Petition for winding-up, unless the company consent. *In re London, Hamburg, and Continental Exchange Bank. Emmerson's Case.* 231

3. Two persons agreed to sell certain property to a company for a price to be paid, part in fully paid-up shares, part in shares partly paid-up, and the remainder in cash, as and when the company should receive any money in respect of shares subscribed for over and above the first £1000; and it was provided that if the shares and cash should not be paid within two years from the date of the agreement, the agreement should be void, and that any moneys and shares paid thereunder should be retained as liquidated damages for breach of the agreement. The shares were issued to the vendors and their nominees, but the event on which the cash was to be paid never happened, and the company was wound up within two years from the date of the agreement:—

Held, that the vendors must be placed on the list of contributories in respect of their shares; but that they were entitled to a lien on the property sold for the amount of cash which had not been paid. *In re Patent Carriage Company. Gore & Durant's Case.* 349

4. *A.* on being invited to become a director of a banking company about to be established gave a verbal assent, provided he should be satisfied that a certain proportion of the capital had been subscribed, and that certain persons named in the prospectus as directors would actually join the board.

He attended one board meeting, and so far took part in the business as on that occasion to sign a cheque together with one of the directors. On receiving, a few days afterwards, a letter of allotment of the shares necessary to qualify him, he at once returned it, declining at the same time to act as director, as he was not satisfied upon the two points stipulated for by him. The secretary wrote back, stating that *A.'s* "resignation" had been accepted. *A.* had nothing more to do with the bank:—

Held, that he was not liable as a contributory. *In re Peninsular, West Indian, and Southern Bank. Austin's Case.* 435

5. Where the articles of association of a company provided that no transfer of shares should be registered unless executed by the transferror and transferree, or unless the transferree had been approved by the board of directors, and a transfer was made after the stoppage of the company and the commencement of the winding-up, and such transfer was executed by the transferror only, but owing to the winding-up was not brought before the directors for their approval; upon application of transferror to be removed from the register of shareholders, and that the transferree's name might be inserted in lieu thereof:—

Held, that the Court could not dispense with the directions contained in the articles, and that the transfer not having been registered or submitted to the directors for their approval, the transferror's name must remain on the list of shareholders. *In re Overend, Gurney & Co. Walker's Case.* 554

6. Where the articles of association of a company provided that the company might decline to register any transfer of shares made by any member in any case where the directors considered that the transfer was made for purposes not conducive to the interests of the company, the directors having passed a resolution that no transfers then in the office should be registered without their express sanction,—a transfer of shares then lodged at the office, duly executed by a shareholder, whose calls were paid, and by the transferree, who was a responsible person, was not registered. An order

was shortly afterwards made for winding-up the company:—

Held, that the directors were not bound to register the transfer, and that the transferror was properly placed on the list of contributories. *In re Joint Stock Discount Company. Shepherd's Case.* 564

7. Where a director of a company had signed the articles of association, which required as the qualification of a director that he should hold twenty-five shares, and had applied for that number of shares, and attended several meetings of the board, but retired from the direction before the allotment of shares took place, and the directors afterwards refused to allot him any shares, and returned the deposit:—

Held, that he was not liable as a contributory on the winding-up of the company. *In re General International Agency Company. Chapman's Case.* 567

See LIMITATIONS, STATUTE OF, 3.

CONVERSION.

T. devised all his real estate to *S.* for life, with remainder to the children of *S.*, in tail, with remainders over, and bequeathed personal estate on corresponding trusts; and he directed his trustees to sell a specific freehold estate, and to invest the proceeds in the purchase of lands in certain counties, or in Government securities, to be settled and assured to and for the like uses and trusts as his real and personal estate were settled, devised, and limited. The trustees, in 1805, sold the freehold estate, and invested the purchase-money in Government securities, and allowed it to remain so invested until the death of *S.* in 1863. *S.* had only one child, who was born and died in 1810:—

Held, that the Government Annuities vested absolutely in the child of *S.* as personal estate. *Rich* v. *Whitfield.* 583

COPYHOLDS.

See MINES AND MINERALS.
TRUSTEE ACT, 1850, 2.

CORPORATE PLAINTIFF, DISCOVERY IN SUIT BY.

See FOREIGN STATE.

CORPUS, WHEN TO SEPARATE USE.

See SEPARATE ESTATE.

COSTS.

See BANKER'S LIEN.
TRUSTEE RELIEF ACT, COSTS UNDER.
WINDING-UP, 1.

COSTS, HIGHER OR LOWER SCALE.

In administration suits, where the gross value of the estate to be administered amounts to 1000*l.* at the time of the institution of the suit, the higher scale of costs applies.

Under the regulations of the Court, solicitors are entitled to charge for settling the minutes of orders, although no minutes are issued. *In re Reece's Estate. Gould* v. *Dummett.* 609

COSTS IN ADMINISTRATION.

In a suit by creditors to administer the realty, there being no personalty, and the realty proving deficient, the Court ordered the costs of the Plaintiffs, and of the Defendants, who were beneficial devisees, to be taxed as between party and party, and paid *pari passu* out of the fund, and the balance of the fund then remaining to be applied in payment of Plaintiffs' extra costs between solicitor and client, and then in payment of debts. *Henderson* v. *Dodds.* 532

COSTS OF READING DEPOSITIONS TAKEN ABROAD.

A third counsel was allowed in a case which occupied six days at the hearing, and where the bill, answers, and evidence, contained upwards of 6000 folios.

Notwithstanding Consolidated Order xl. rule 32, a solicitor is allowed to charge a reasonable sum for reading depositions in a cause taken abroad. *Wentworth* v. *Lloyd.* 607

COSTS, SECURITY FOR.

A Defendant, sued by a limited company, which had called up and expended all its capital, received notice in April, by a report of the directors, that they had no funds to meet a bill which had been drawn on the company by their manager, and that they recommended an issue of new shares with a preferential dividend. On the 4th of May, notice of an extraordinary general meeting for the 12th was given, at which meeting resolutions were passed enabling the directors to borrow a large sum of money on loan. Defendant's extended time for answering expired on the 7th of May, and on the 4th he took out a summons, whereupon he obtained on the 8th a week's further time; and on the 15th he filed his answer. On the same day (though at what hour of the day did not appear), he received notice from the directors that the attempt to raise the money had failed:—

Held, that the Defendant had not by putting in his answer, waived his right of calling upon the Plaintiff company to give security for costs, under the 69th section of the *Companies Act*, 1862.

A. filed a bill against *B.*, the registered holder of 1000 shares in a company, and against the company and their secretary, for specific performance of an alleged contract by *B.* to transfer the shares to *A.*, and for an injunction to restrain the company from transferring the shares to any one else than to *A.* The company thereupon filed a bill against *A.* and *B.*, praying for declarations that the alleged contract was fraudulent and void, and that *A.* and *B.* were trustees of the shares for the company:—

Held, that the second suit was not so strictly in the nature of a cross suit to the first, that *A.* was deprived of the right of calling upon the company to give security for costs. *Washoe Mining Company* v. *Ferguson.* 371

COSTS ON WINDING-UP PETITIONS.

1. Where a Petition to wind up a company is dismissed, the Petitioner will, as a general rule, be ordered to pay the costs of the company opposing the Petition, and of every person against whom a personal charge is made by the Petition and who appears and disproves such charge and is otherwise free from blame; but no other person appearing either to support or oppose the Petition will be allowed any costs.

Where the winding-up order is made, the Petitioner and the company will have their costs out of the estate, and shareholders and creditors, who appear to support the Petition, will have out of the estate one set of costs between them. *In re Humber Ironworks Company.* 15

2. Where several Petitions are presented for winding up a company, the Court will consider the circumstances of each Petition as if it were a separate one.

Where a Petitioner was a creditor of a banking company for only 65*l.*, and the debt was attached in the Lord Mayor's Court, the Petition was, under the circumstances, dismissed with costs.

Where a Petition is dismissed, shareholders who oppose will have one set of costs, and creditors who oppose,

another set of costs. *In re Humber Ironworks Company* (Law Rep. 2 Eq. 15) not followed. *In re European Banking Company. Ex parte Baylis.* 521

COUNTY PALATINE, READING EVIDENCE IN SUIT IN.

See EVIDENCE, ORDER TO READ.

COVENANT.

See PUBLIC HOUSE.

COVENANT TO INSURE.

See POLICY.

COVENANT TO REPAIR ROAD.

See LAND TRANSFER ACT.

COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY.

An assignment by an intended wife of her future property, followed by a covenant by the intended husband to settle the after-acquired property of the wife, will not extend to property given to the wife in terms which are inconsistent with the trusts of the settlement.

Therefore, where an intended wife, by an ante-nuptial settlement, assigned all the personal estate *to which she might at any time thereafter become entitled in any way howsoever*, upon the trusts of the settlement; and the deed contained a covenant by the intended husband to settle *any real or personal estate whatsoever* that should descend to, devolve upon, or vest in the wife; and where a legacy was, after the marriage, bequeathed to the wife, with a direction to the executors to pay such part of the legacy to the wife as she might require *for her separate use, independent of her husband, and to be free in all respects from his debts and engagements*:—

Held, that the settlement had no operation upon such part of the legacy as was required by the wife to be paid to her upon her separate receipt. *In re Mainwaring's Settlement.* 487

COVENANT FOR TITLE.

On a sale by the Court of real estate vested in trustees whose receipt was declared to be a good discharge, in order to divide the proceeds among the beneficiaries:—

Held, that the beneficiaries were not bound to covenant for title.

The practice of conveyancers of making beneficiaries parties to covenant for title to the extent of their interest in the proceeds, where the receipt of the trustees is declared to be a good discharge, has never been adopted by the Court in sales under its decree. *Cottrell* v. *Cottrell.* 330

CREDITOR'S SUIT.

See COSTS IN ADMINISTRATION.

CROSS BILL.

See FOREIGN STATE.

CROSS CAUSE.

See COSTS, SECURITY FOR

CROSS-EXAMINATION.

An affidavit filed by an accounting Defendant in an administration suit verifying his accounts is the subject of cross-examination under 15 & 16 Vict. c. 86, s. 40, but he is entitled to notice of the points on which he is to be cross-examined. *In re Lord's Estate. Lord* v. *Lord.* 605

CUSTOM, EVIDENCE OF.

See MINES AND MINERALS.

CUSTOMARY LANDS, FREEHOLD IN.

See MINES AND MINERALS.

CY PRÈS.

Testator declared his will to be, that his property be inherited by his nephews, *C.* and *T.*, and the sons of his late brother *A.*, during their lives, and after the decease of *C.* and *T.* that the eldest sons of *C.* and *T.* inherit the same during their lives, and so on; the eldest son of each of the two families to inherit the same for ever:—

Held, that the nephews *C.* and *T.* took estates for life, with remainder to their eldest son in tail. *Forsbrook* v. *Forsbrook.* 799

DAMAGE, EXTENT OF.

See LIGHT, 2.

DAMAGES.

When the Plaintiff fails to establish any covenant, contract, or agreement, of which specific performance can be directed, the Court has no jurisdiction to grant relief in damages. *Lewers* v. *The Earl of Shaftesbury.* 270

DAMAGES, INQUIRY AS TO.

See LIGHT, 1.

DAMAGES PAYABLE BY SHIP-OWNER.

See MERCHANT SHIPPING ACT, 1854, ss. 510, 511, 512, 514.

DEATH BEFORE "ACTUALLY RECEIVING."

Testator devised a mixed fund of realty and personalty, after provision should have been made for the payment of his debts, testamentary and funeral expenses, and the legacies, annuities, and payments, thereinbefore directed, upon trust—1, that the same should be equally divided, share and share alike, between his nephews and nieces. He then directed, 2, that the property, whether real or personal, which by that will he left to his nephews and nieces, should, on their decease severally, be divided equally, share and share alike, between such of their children as might survive them. He then continued, 3: "And if either or any of my nephews and nieces should die *before me*, or *before they shall have actually received* what is to go to them under this will, their share shall be divided equally between their children, and in default of children, equally between my surviving nephews and nieces":—

Held, 1. That all nephews and nieces who survived the testator took absolutely. 2. That the limitation over on death before actually receiving was inoperative in law, but that it was legitimate to use it as a means of explaining the intention of the testator.

A void limitation may be referred to in explanation of the testator's intention. *Martin* v. *Martin.* 404

DEATH BEFORE "DUE AND PAYABLE."

Testator devised his real estates to his widow for life, and after her death directed the executors to sell, and divide the proceeds equally between his seven children, the shares of his three sons to be vested in them respectively when and as they should attain twenty-one, and the shares of his four daughters to be vested interests in them when and as they attained that age or were married. During the minorities of his children, their shares were directed to be invested and applied for their maintenance and advancement. In case any of the said children should die leaving issue lawfully begotten "before the share of such child or children so dying as aforesaid shall become due and payable," the share was to be equally

divided "amongst all the issue of such child or children as and when such issue shall attain the said age of twenty-one years;" the interest of such child's share so dying, leaving issue, to be applied for the advancement, &c., of such issue during minority.

E., one of testator's daughters, married and died in the lifetime of the testator's widow, leaving an infant child, and having assigned her share by way of mortgage:—

Held, that the words "due and payable," did not postpone the vesting of the share until the death of the tenant for life, and that *E.'s* assignee was entitled, and not her infant daughter under the gift over. *Mendham* v. *Williams.* 396

DEATH BEFORE "PAID OR PAYABLE."

Bequest "to my nephew, *A.*, 2000*l.*, and in case of his death before the same shall be actually paid or payable to him," the trustees to stand possessed thereof for his children at twenty-one; and in case no child of *A.* should acquire a vested interest, then over. Testator appointed his widow and *A.* executors, and both proved; but *A.* died three months after testator, before any part of the legacy was paid or appropriated, leaving one child only, who died an infant:—

Held, that the representative of *A.* was not entitled, and that the gift over took effect. *Whitman* v. *Aitken.* 414

DEATH BEFORE "RECEIVING BENEFIT."

Testator bequeathed personal estate in trust to pay the proceeds to his widow for life, and after her death to divide the capital between his brothers *A.* and *B.* and his sisters *C.* and *D.* He declared that in case any of them should die in his lifetime, *and* before they should have received any benefit from the aforesaid bequest, then the share of him or her so dying should be divided among his or her respective children.

A. survived the testator, and died in the lifetime of the tenant for life, having bequeathed his share:—

Held, that "*and*" could not be read "*or*," and that on the death of the testator the share of *A.* was absolutely vested in him, and transmissible by his will. *In re Kirkbride's Trusts.* 400

DEBT, AGREEMENT TO TAKE PART IN FULL SATISFACTION.

See MORTGAGE.

DEBTOR AND CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.
SPECIALTY DEBT.

DEFICIENT FUND.

See COST IN ADMINISTRATION.

DEMONSTRATIVE LEGACY.

A testator being entitled to real and personal estate absolutely, and having a power of appointment over certain settled personal estate in favour of his children, gave by his will certain pecuniary legacies to the children, and then appointed the settled property subject and charged with the legacies to his children. He also bequeathed and devised his residuary personal and his real estate, subject to the payment of the legacies given by his will:—

Held, that the legacies given to the children were in the nature of demonstrative legacies, and that the settled property was primarily applicable for the payment of them. *Disney* v. *Crosse. Eyre* v. *Parker.* 592

DEPOSITS ON SHARES.

See JURISDICTION.

DEPOSITIONS FOREIGN, COSTS OF READING.

See COSTS OF READING DEPOSITIONS TAKEN ABROAD.

DEPOSITIONS IN ANOTHER COURT.

See EVIDENCE, ORDER TO READ.

DEPUTY SPEAKER, CERTIFICATE OF.

See PARLIAMENTARY DEPOSIT.

DEVISE "SUBJECT TO THE SAME CONDITIONS" AS OTHER SHARES WHICH WERE SETTLED.

Testatrix, by her will, after reciting that being joint heiress with her two sisters she was possessed of a third part of the rectorial tithes of *B.*, gave to her sisters the said third part or share, to be equally divided between them, *and to be held by and subject to the same conditions* by which they, her two sisters, held the other two parts or shares.

At the date of the will, both of the sisters were married, and on the occasion of the marriage of each, her share of the tithes had been put into settlement:—

Held, that the sisters became entitled respectively to a moiety of the third upon the trusts declared by their respective marriage settlements of the shares originally vested in them in their own right. *Ord* v. *Ord.* 393

DEVISE OF TRUST ESTATE.

See "SOLE USE."

DEVISEE, RESIDUARY.

See MARSHALLING.

DIRECTOR, QUALIFICATION OF.

See CONTRIBUTORY, 7.

DIRECTORS' APPROVAL OF TRANSFERREE.

See CONTRIBUTORY 5, 6.

DIRECTORS, MISCONDUCT OF, AS AFFECTING WINDING-UP.

See WINDING-UP, 1.

DISCOVERY.

1. In a suit to restrain an infringement of a patent which is contested on the ground of anticipation by prior user, the Plaintiff is not entitled to discovery from the Defendant in answer to a general interrogatory as to the instances of prior user on which he relies. *Bovill* v. *Smith.* 459

2. A bill for specific performance of a contract to sell to the Plaintiff certain premises and machinery, alleged that Defendants, the vendors, had since the date of the contract let the premises to third parties, and the Defendants were required by the interrogatories to set out the names of such persons, the particulars of the selling, and an account of the rents of the premises, and also to state whether the plant was not being deteriorated by the user thereof by the Defendants' tenants.

The Defendants having refused to give the discovery sought by the interrogatory:—

Held, on exception to the answer for insufficiency, that the Plaintiff was entitled to know to whom the property had been let, and for what term. *Dixon* v. *Fraser.* 497

See DOCUMENTS, AFFIDAVIT OF.
PRODUCTION OF DOCUMENTS, 2, 3.

DISCOVERY IN SUIT BY CORPORATE PLAINTIFF.

See FOREIGN STATE.

DIVESTING.

See VESTING.

DIVORCE COURT.

See SEPARATION DEED.

DOCUMENTS.

See PRODUCTION OF DOCUMENTS, 3.

DOCUMENTS, AFFIDAVIT OF.

When a Defendant, after answer, has obtained an affidavit as to documents in the common form, if he finds that the inquiry in the common form is not sufficiently pointed to enable him to obtain discovery as to specific matters, his proper course is to file a concise statement of the specific matters with respect to which he seeks discovery, with interrogatories, which it will be the duty of the Plaintiff to answer fully; and it will be no answer to the Defendant to say that some of the matters given in the specific statement were comprised in, or that they were all referred to in the answer, and that the first affidavit was sufficient.

A Defendant having filed a concise statement, with interrogatories, under the above circumstances, is not entitled, before the answer has come in, to take out a further summons for an affidavit of documents in the same special form as that in which he has interrogated; and such a summons will be dismissed as unnecessary. *Newall* v. *The Telegraph Construction Company.* 756

DOCUMENTS, PRODUCTION OF.

See PRODUCTION OF DOCUMENTS, 4.

DOMICIL.

1. A person having a vested reversionary interest in a trust fund of personal property in *England*, became insolvent in *South Australia*. The property fell into possession, but before it was paid over the insolvent died:—

Held, that if his domicil was Australian, the assignees under the insolvency were entitled to payment of the fund, but that if it was English, the executrix who had proved in *England* was entitled, and the assignees, in order to obtain it, must sue such personal representative.

On petition by the executrix for payment of the fund, inquiry as to domicil ordered. *In re Blithman.* 23

2. A legacy bequeathed to an infant domiciled abroad, may be paid when the infant comes of age by the law of *England*, or of the place of domicil, whichever first happens; and in the meantime must be dealt with in the usual way as an infant's legacy, although by the law of the place of domicil the guardian of the infant may be entitled to receive the legacy. *In re Hellmann's Will.* 363

DOUBLE FINE.

See TRUSTEE ACT, 1850, 2.

DYING IN LIFE OF *A.* WITHOUT LEAVING ISSUE.

Gift by will of a freehold house and the furniture therein to *A.*, but if *A.* should die in the lifetime of *B.* without leaving lawful issue, then over.

A. died in the lifetime of *B.*, leaving issue, who all died in the lifetime of *B.*:—

Held, that the gift over took effect. *Jarman* v. *Vye.* 784

EASEMENT.

A. and *B.* were tenants of adjoining premises, under the same landlord. *A.* had a well upon his premises, from which *B.*'s premises were supplied with water by means of a pipe. Both premises, with others, were put up for sale by auction, in lots, one of the conditions being that each lot was subject to all rights of way and water and other easements (if any) subsisting thereon. *A.* and *B.* both purchased the lots of which they had been tenants. The vendor insisted that *A.* had pur-

chased subject to *B.*'s right of water. *A.* filed a bill for specific performance of the contract, without any liability to such easement:—

Held, that *B.* had no easement or right of water, but merely a license from his landlord during his tenancy; and that *A.* was entitled to the relief asked. *Russell* v. *Harford.* 507

See LIGHT, 1, 2.

ELECTION.

Where marriage articles, executed when the lady was a minor, contained a covenant by the husband to settle her interest in real and personal estate, including after-acquired property, on the usual trusts, and she died without having confirmed the articles, leaving her husband surviving, and an only child, her heiress-at-law, who claimed an interest under the articles in the personal estate, and also claimed the real estate attempted to be settled as heiress-at-law of her mother:—

Held, that the heiress-at-law was put to her election whether she would take under or against the settlement. *Brown* v. *Brown.* 481

ELECTION BY HEIR.

A will, attested by two witnesses, contained a devise of freeholds in *England* to *A. D.* (the testator's son and heir) for life, with remainder to trustees, and a devise to them of estates in *St. Kitts* upon trust to sell and to invest the proceeds in estates in *England*, to be held upon the same trusts. *A. D.* was in possession of the English, and he received the rents of the *St. Kitts* estates during his life; and, with his concurrence, the trustees made efforts—though ineffectual—to sell the latter. After the death of *A. D.*, intestate, the trustees contracted to sell one of the *St. Kitts* estates, but the purchaser refused to complete, on the ground that the will was inoperative in the island, and that the estates descended upon the heir:—

Held, that *A. D.* had elected to take under the will, and that his infant heir was bound by his acts, and was a trustee under the Act of 1850, for the person claiming under the will. *Dewar* v. *Maitland.* 834

EQUITABLE CHARGE, REGISTRATION OF.

See LAND TRANSFER ACT.

EQUITABLE MORTGAGE OF SHARES IN MINE.

Foreclosure, and not sale, is the remedy of an equitable mortgagee of a share in a mining partnership.

The articles of a mining partnership empowered any partner to sell or dispose of his shares, but gave a right of pre-emption to the other partners. *B.*, one of the partners, made an equitable mortgage of his shares, which was assented to by the other partners, and afterwards sold the shares to *M.*, one of his co-partners:—

Held, that all the partners were necessary parties to a suit for the foreclosure of the mortgaged shares, that in default of redemption by *M.*, the other partners were entitled to take to the mortgaged shares on payment of the mortgage debt; that in default of redemption by *M.*, or the other partners, the mortgagee was entitled to foreclosure, and to an account of the profits of the partnership made after the filing of the bill, and of the existing debts and liabilities of the partnership, and to have the share of such debts and liabilities attributable to the mortgaged shares ascertained. *Redmayne* v. *Forster.* 467

EQUITABLE PLEA.

If a Defendant in an action at law pleads an equitable plea, he cannot come for an injunction to restrain the action upon the same ground which is the subject of the plea, provided the Court of law can give such relief as

this Court will give. But if it cannot, then the equitable plea is no bar to the Defendant coming to this Court, subject, however, to the costs of the plea being controlled by the Court of equity.

This Court will restrain an action for damages where the defence relied upon is an alleged agreement between the parties for the performance of certain acts, which a Court of law cannot give effect to. *Waterlow* v. *Bacon.* 514

ERASURE IN WILL.

Testator bequeathed several life annuities and legacies of sums of money and stock to persons, and legacies of sums of stock to charities, and directed his residue, after payment of debts, life annuities, and the pecuniary legacies thereinbefore given, to be accumulated during a term of two years or two lives in being, whichsoever should be the larger term, and then to be divided *amongst the several persons taking pecuniary legacies* (under which denomination legacies of stock were intended to be included), under his will or any codicil thereto, rateably and in proportion to the amount in value of their respective original legacies, the legacies of stock being for that purpose estimated at par.

Testator also directed that inasmuch as certain parts of the proceeds of his estate might be of such a nature as not to be legally applicable to answer and satisfy bequests to charities, the assets should be marshalled, so that such of the legacies thereby bequeathed as were given to charities might be paid exclusively out of the funds legally so applicable.

In the original will was a clause whereby annuitants were excluded from participation, and also representatives of legatees who might die before the period of distribution. By a codicil in the margin of the will this passage was struck through with a pen, and the cancellation attested in the ordinary testamentary form, one of the witnesses being a legatee who happened to die before the period of distribution:—

Held, that whilst the established rule of law declares that, in the absence of evidence of intention to the contrary, "legacies" include annuities; yet here there was sufficient evidence of the testator's intention to exclude annuitants, and that the cancellation of the explanatory clause, whilst it restored the original ambiguity, did not point to any alteration of intention, or admit (in this instance) the operation of the ordinary legal rule:

Held, further, that the direction as to marshalling in favour of charities, extended to the gifts of residue as well as to the original legacies:

Held, further, that the representatives of the legatee who attested the cancellation, and died before the period of distribution, were excluded from participation, under the 15th section of the *Wills Act* (1 Vict. c. 26). *Gaskin* v. *Rogers.* 284

ESCHEAT.

See INQUISITION, LEAVE TO TRAVERSE.

ESTATE TAIL.

See CY PRÈS.

EVIDENCE.

See EXAMINER, PROCEEDINGS BEFORE. PATENT, 3.

EVIDENCE, ORDER TO READ.

An order of course to read, in a suit in Chancery, copies of a bill, order, decree, and affidavits in a suit in the Court of the County Palatine, alleged to have been between the same parties and directed to the same issue:—

Held irregular. *Stephenson* v. *Biney.* 303

EXAMINER, PROCEEDINGS BEFORE.

In an examination taken *ex parte*, the examiner ought not to refuse to allow questions to be put, unless upon matters which would clearly and palpably not be evidence. *Surr* v. *Walmsley.* 439

EXCEPTION.

See DISCOVERY, 1, 2.

EXCESS OF APPOINTMENT.

See HEIRS OF BODY READ NEXT OF KIN DESCENDED.

EXECUTION AFTER WINDING-UP.

Notwithstanding the 163rd section of the *Companies Act*, 1862, which enacts that "where any company is being wound up by or subject to the supervision of the Court, any execution put in force against the estate or effects of the company shall be void to all intents," the Court has power, under the 87th section, where a winding-up order has been made, to give leave to a creditor to proceed with an execution.

Semble, the 163rd section has reference only to cases of fraudulent preference.

Where a creditor, in an action against a company registered under the Act of 1862, had, before a petition for winding up the company was presented, recovered judgment, and sued out a writ of execution, which was in the sheriff's hands, and would have been executed but for resistance made to the sheriff's officer, the Court, after making the winding-up order, in the exercise of its discretion, dissolved an injunction, restraining the execution, which had been obtained on motion *ex parte* by the petitioning creditor immediately after the presentation of the petition, and gave leave to put in force the execution. *In re London Cotton Company.* 53

EXECUTOR, GIFT TO, IN THAT CHARACTER.

Devise of real estate "to my friends" *A.*, *B.*, and *C.*, on certain trusts. Bequest of a sum of stock to *A.*, *B.*, and *C.*, "my executors hereinafter named," upon trust for *M.* for life, and then to *A.*, *B.*, and *C.*, in equal shares "for their own respective absolute use and benefit." Further legacy of 200*l.* "to each of my executors," in acknowledgment of trouble in execution of will. Appointment of *A.*, *B.*, and *C.*, executors:—

Held, that an executor and trustee who never acted was not entitled to share in the bequest of stock. *Slaney* v. *Watney.* 418

EXECUTOR, WAIVER OF STATUTE OF LIMITATIONS BY.

See LIMITATIONS, STATUTE OF, 4.

EXECUTORS, GIFT TO ONE OF.

Gift by testator of "all my personal estate to my grandson, his executors, administrators, and assigns, subject to the payment of debts, legacies, and personal expenses, and to the trusts hereinafter contained, upon trust to convert and to stand possessed of the said trust moneys," upon trusts which did not exhaust the funds. The testator then appointed his grandson, with three others, executors:—

Held, that the grandson took the residue beneficially. *Clarke* v. *Hilton.* 810

EXPRESS TRUST.

See LIMITATIONS, STATUTE OF, 1.

FACTORS' ACTS.

H., a speculator in cotton, in July, 1864, requested *W.* to purchase for him, in *W.*'s name, 400 bales of Egyptian cotton, for delivery in the September following. *W.* assented, employing for

the purpose (with the knowledge of *H.*), as his broker, *C.*, who knew that *W.* was acting as agent, and *W.* became liable on a series of contracts, the first of which was due on the 9th of September. The price of cotton falling, *C.* refused to take up the contracts unless he was secured from loss, and *W.* applied to *H.*, who, on the 8th of September, promised to give some security, and on the 26th of September, deposited with *W.*, and *W.* deposited with *C.*, with unconditional power of sale, a bill of lading of a cargo of *Surat* cotton of which *H.* was the consignee from the Plaintiffs, a firm at *Bombay*, as their factor; but *H.* was not known either to *W.* or to *C.* to be other than the true owner. On the same day, *C.* made a first payment on account of *W.'s* indebtedness under the contracts; and he continued to make other payments, *W.* not advancing anything. In October *H.* stopped payment, and the proceeds of the cargo of *Surat* cotton were now claimed by the Plaintiffs:—

Held, that the deposit of the bill of lading by *H.* was not made in respect of an antecedent debt of *H.* to *W.* within the meaning of the *Factors' Acts;* and that having been made by *H.* in respect of an advance by *C.* on behalf of *W.*, within the meaning of the same Acts, it was binding on the Plaintiffs. *Jewan* v. *Whitworth.* 692

FALSA DEMONSTRATIO.

See FARM.

FARM.

If all the words of description are true, and correctly describe a thing certain, the Court will not presume that there is any error, so as to extend the meaning of the words to something not properly comprehended in the express words.

In 1802 testator purchased an estate called *A.* farm, in the parish of *R.*, in the county of *H.* In 1813 and 1815 he acquired adjoining land in the parishes of *S.* and *B.*, in the same county, which was thrown into *A.* farm, and occupied therewith, and the whole thenceforth called *A.* farm. By his will, made in 1817, he devised all his estate, consisting of *A.* farm, in the parish of *R.*, in the county of *H.*, to trustees:—

Held, that the land in the parishes of *S.* and *B.* did not pass by the specific devise. *Pedley* v. *Dodds. Dodds* v. *Pedley.* 819

FERRY ANCIENT.

See BILL OF PEACE.

FOLLOWING TRUST FUNDS.

See SOLICITOR, MISAPPROPRIATION BY.

FORECLOSURE OR SALE.

See EQUITABLE MORTGAGE OF SHARES IN MINE.

FOREIGN GUARDIAN.

The Court will not from any supposed benefit to infant subjects of a foreign country, who have been sent to this country for the purposes of education, interfere with the discretion of the guardian who has been appointed by a foreign Court of competent jurisdiction, when he wishes to remove them from *England* in order to complete their education in their own country.

But the Court refused to discharge an order by which guardians had been appointed over the children in this country: and merely reserved to the foreign guardian the exclusive custody of the children, to which he was entitled by the order of the Court of his own country. *Nugent* v. *Vetzera.* 704

FOREIGN INFANT, MAJORITY OF.

See DOMICIL, 2.

FOREIGN LAND, ELECTION BY HEIR AS TO.

See ELECTION BY HEIR.

FOREIGN STATE.

The *United States of America* suing in the Courts of this country, and thereby submitting themselves to the jurisdiction, stand in the same position as a foreign sovereign, and can only obtain relief subject to the control of the Court in which they sue, and pursuant to its rules of practice; according to which every person sued in this Court, whether by an individual, by a foreign sovereign, or by a corporate body, is entitled to discovery upon oath touching the matters upon which he is sued, and to file a cross bill for the purpose of obtaining such discovery.

Proceedings were accordingly stayed in a suit by the *United States of America*, suing in their corporate capacity, until an answer should have been put in to the cross bill of the Defendant. But *Held*, that the President of the *United States* had been improperly made a Defendant to the cross bill, as the person to give discovery.

Semble, that a demurrer should have been filed to a bill by the *United States*, where no public officer was put forward as representing their interests who could be called upon to give discovery upon a cross bill. *Prioleau* v. *United States, and Andrew Johnson.* 659

FORFEITURE.

Gift by will of a share in residuary real and personal estate to *L.* for life; but if he should "by any act or default, or by operation of law, alien, charge, or dispose of the life interest, or in any manner anticipate the same to or in favour of any other person or persons," the gift to be void, and the share to go to the children of *L.*

At the death of the testatrix *L.* was a bankrupt, having been adjudicated a few days before on his own petition. Assignees were appointed; but no steps were taken to realise the assets, and within a twelvemonth the bankruptcy was, by an act of the creditors under their statutory powers annulled:—

Held, that a forfeiture of the life estate, within the meaning of the clause in the will, had not taken place. *Lloyd* v. *Lloyd.* 722

FORFEITURE OF PLANT.

See CONTRACTOR'S PLANT, FORFEITURE OF.

FORGERY.

A., one of three trustees, executed an assignment of leasehold property held jointly by them, to a purchaser, and forged the signatures of his two co-trustees, and also the requisite assent of the *cestui que trust* to the sale. *A.* was a solicitor, and acted as such on behalf of the purchaser:—

Held, that the circumstances attending the transaction were sufficient to affect the purchaser with notice of some trust, if not the actual nature of it; and that he had constructive notice of the trust through the knowledge of *A.*, his solicitor:

Held also, that the execution by one of the three joint tenants was a valid assignment of the legal interest in one-third to the purchaser, but that the actual and constructive notice of the trust disentitled him to the beneficial interest, and a re-conveyance ordered. *Boursot* v. *Savage.* 134

FRAUD.

See RELEASE.

FRAUDULENT DEVISES.

See STATUTE OF LIMITATIONS, 2.

FREIGHT, ASSIGNMENT OF.

The assignee of a particular freight who gave to the charterers notice of his security:—

Held, entitled in priority to the general assignee of all freight to be earned by the same ship, who was prior in date, but gave no notice, and took no steps to enforce his mortgage until after the particular assignee had given notice to the charterer and the cargo had been in part discharged. *Brown* v. *Tanner*. 806

GENERAL WORDS.

See PERSONAL ESTATE, BEQUEST OF.

GIFT BY A MOTHER TO CHILDREN "LEGITIMATE OR OTHERWISE."

Bequest by a single woman who had gone through the ceremony of marriage with her deceased sister's husband, in favour of her children "legitimate or otherwise." At the date of the will she had one child living, and several were born afterwards:—

Held, that the after-born children were excluded; and that the gift enured to the benefit only of the child living at the date of the will. *Howarth* (*otherwise Mills*) v. *Mills*. 389

GIFT, ORIGINAL OR SUBSTITUTIONARY.

See MAINTENANCE, GIFT OF INCOME FOR.

GIFT OVER.

See DYING IN LIFE of *A.* WITHOUT LEAVING ISSUE.
VESTING.

GIFT OVER ON DEATH.

See SETTLEMENT.

GRANDNEPHEWS INCLUDED IN NEPHEWS.

See CODICIL, WILL EXPLAINED BY.

GUARDIAN, FOREIGN.

See FOREIGN GUARDIAN.

HEIR, ELECTION BY.

See ELECTION BY HEIR.
ELECTION.

HEIR-LOOMS.

See PERSONALTY, LIMITATION OF BY REFERENCE TO REALTY.

"HEIRS OF BODY," READ NEXT OF KIN DESCENDED.

Testator gave the residue of his estate, consisting wholly of personalty, to trustees, upon trust for *E. L.* for life, and after her decease, upon trust "for the benefit of the heirs of the body of *E. L.*, first, to educate at their discretion the said heirs, and lastly, to pay to the said heirs the said residue at their respective ages of twenty-one, in such proportions as *E. L.* might by deed grant, or by will direct":—

Held, upon the construction of the will, that the objects of the power were such of the statutory next of kin of *E. L.* as were descended from her.

E. L. by will appointed a legacy of 100*l.*, part of the fund, to a stranger to the power; and appointed the balance of the fund (after payment of legacies to objects of the power), which balance amounted to 260*l.*, to pay her own debts; and "should any surplus remain," she gave it to *E.*, who was one of the objects of the power:—

Held, that the 100*l.*, was unappointed, and did not pass to *E.*; but that the 260*l.* was well appointed to *E.* freed from the charge of the debts, which failed as an invalid appointment. *In re Jeaffreson's Trusts*. 276

HIGHER OR LOWER SCALE OF COSTS.

See COSTS, HIGHER OR LOWER SCALE OF.

HIGHWAY BOARD.

The Court will restrain the members of a highway board (being the

local authority for carrying out the provisions of the *Nuisances Removal Acts*) from allowing any fresh communications to be made with a sewer constructed by their predecessors in office which occasions a nuisance to the inhabitants of the adjoining parish by draining into a stream flowing through such parish, although from the limited nature of their powers no order can be made against the board which will have the effect of compelling them to abate the nuisance altogether by stopping up the sewer, and ceasing to drain into the stream. *Attorney-General* v. *Richmond.* 306

HUSBAND AND WIFE.

See Covenant to settle after-acquired Property.
Married Woman, Acquiescence by.
Separation Deed.
Separate Estate, Liability of.

ILLEGITIMATE CHILREN.

See Gift by a Mother to Children "Legitimate or otherwise."

INCOME OF LEGACY.

See Legacy, Specific or Demonstrative.

INCOME TO SEPARATE USE.

See Separate Estate.

INFANT.

See Foreign Guardian.

INFANT, ELECTION BY.

See Election.

INFANT'S LEGACY.

See Domicil, 2.

INFLUENCE, PREPONDERATING.

See Shareholder, Preponderating Influence of.

INJUNCTION.

See Highway Board.
Light, 1, 2.
Nuisance.
Railway Company.
Separation Deed.

INJUNCTION AFTER EQUITABLE PLEA.

See Equitable Plea.

INJUNCTION, INTERLOCUTORY.

In a suit on behalf of *Company A.*, praying relief on the footing that a payment for promotion money made by their directors to *Company B.*, was a breach of trust, the Court refused to restrain *Company B.* (which was a limited company being voluntarily wound up) by interlocutory injunction from dealing with the money or dissolving the company: the right to such money being the question to be decided at the hearing, and there being no admission of a trust so as to entitle the Plaintiffs to an order for payment of the money into Court. *Bank of Turkey* v. *Ottoman Company.* 366

INQUISITION, LEAVE TO TRAVERSE.

On a petition of a grantee from the Crown of a manor with escheats, the Court granted leave to the Petitioner to traverse an inquisition finding that certain lands within the manor had devolved on the Crown by virtue of the prerogative Royal. The Court has jurisdiction where there is sufficient evidence, not merely to give leave to traverse, but wholly to quash

the inquisition. *In re Ann Parry. Ex parte Duke of Beaufort.* 95

INSURANCE.

See TRUSTEE RELIEF ACT, COSTS UNDER.

INSURANCE COVENANT.

See POLICY.

INTEREST.

A contract for sale of land provided that the purchaser should pay interest on the purchase-money at 4 per cent. from the time of taking possession until the 1st of July, 1858, the day appointed by the contract for the payment of the purchase-money, and after that day at 5 per cent., if the purchase-money should not be then paid, and after the 1st of January, 1859, at 8 per cent., with a proviso that this should not give the purchaser the right to delay the payment of the purchase-money on paying such higher rate of interest. The purchaser took possession of the land in 1857, but owing to circumstances not caused by the misconduct or negligence of the vendor, the purchase was not completed until 1865:—

Held, that the stipulation for payment of a higher rate of interest was not in the nature of a penalty to secure the punctual payment of the purchase-money, against which the purchaser was entitled to be relieved, but a separate and distinct contract which he was bound to perform. *Herbert* v. *Salisbury and Yeovil Railway Company.* 221

See LIMITATIONS, STATUTE OF, 1.

INTERROGATORIES BY DEFENDANT.

A Defendant may file interrogatories for the examination of the Plaintiff after notice of motion for decree has been given, and the Plaintiff has filed his affidavits; and proceedings in the suit will be stayed until the Plaintiff has answered, provided that there has not been any excessive delay. *Brancker* v. *Carne.* 610

See DOCUMENTS, AFFIDAVIT OF.

INTERPLEADER BY MASTER OF SHIP.

See SHIP, PROCEEDINGS AGAINST.

ISSUE, DEFAULT OF.

See DYING IN LIFE OF *A.* WITHOUT LEAVING ISSUE.

ISSUES.

See PATENT, 1, 3.

ISSUES, AMENDMENT OF.

See PATENT, 2.

JOINT POSSESSION.

See PRODUCTION OF DOCUMENTS, 2.

JOINT STOCK COMPANIES ACT, 1856.

See WINDING-UP, 3.

JOINT STOCK COMPANY.

See LIMITATIONS, STATUTE OF, 3.

JUDGMENT CREDITOR.

See RAILWAY COMPANY, ORDER FOR SALE AGAINST.

JURISDICTION.

A person who has taken shares in a company which was provisionally registered under the Act of 1844, and paid deposits thereon, cannot recover

the deposit by a suit in equity, but must bring an action at law.

One of the promoters of a company cannot maintain a suit against his fellow-promoters for contribution towards expenses incurred by him in promoting the company, unless he is willing that an account should be taken of the expenses incurred by all the promoters. *Denton* v. *Macneil.* 352

See FOREIGN GUARDIAN.
FOREIGN STATE.
INJUNCTION, INTERLOCUTORY.
INQUISITION, LEAVE TO TRAVERSE.

LANDS CLAUSES ACT, 1845, s. 128.

See SUPERFLUOUS LANDS.

LAND TRANSFER ACT.

A., the owner of *Blackacre*, and *B.* the owner of *Whiteacre*, mutually covenanted to bear the expense of keeping in repair a private road, of which they had the joint use, in proportion to the acreage of their respective properties, and the deed contained a proviso that in addition to the covenants thereinbefore contained, it was intended that, by virtue of the deed, the expense of the repair of the road should be considered as a charge in equity, and, as far as circumstances would admit, at law also, upon the owners for the time being of *Blackacre* and *Whiteacre* in the above proportions :—

Held, that the proviso did not create a charge on the lands, and consequently that, upon the registration of *Blackacre* with an indefeasible title under the 25 & 26 Vict. c. 53, *B.* was not entitled to have a notice of the proviso entered on the record of title. *In re Drew's Estate. Ex parte Mason.* 206

LEASE UNDER POWER.

See APPORTIONMENT.

LEASES AND SALES ACT.

A testator devised all his real and personal estate to trustees upon trust to sell, and out of the proceeds to pay his debts, and to invest the surplus; and out of the income of the real and personal estate, or of such investments, to pay an annuity to his wife, and subject thereto, to stand possessed of his said real and personal estate for his four children in equal shares: such shares to vest on the children respectively attaining the age of twenty-one, or marrying with consent: and in case of the death of either of his children under twenty-one, or without having been so married, the share of such of them as should so die was to be held in trust for the others, or survivors or survivor of them : and in case all the children should so die, then upon trust for his wife absolutely :—

Held, that, after the death of the widow, the real estate was settled within the meaning of the above Act. *Collett* v. *Collett.* 203

LEASING POWER.

See MINES, OPEN AND UNOPENED.

LEGACY.

See BLANKS IN WILL.
DEATH BEFORE "ACTUALLY RECEIVING."
DEATH BEFORE "DUE AND PAYABLE."
DEATH BEFORE "PAID OR PAYABLE."
DEATH BEFORE "RECEIVING BENEFIT."
DEMONSTRATIVE LEGACY.
EXECUTOR, GIFT TO, IN THAT CHARACTER.
LIMITATIONS, STATUTE OF, 5.

LEGACY, SPECIFIC OR DEMONSTRATIVE.

Testator bequeathed as follows :—"The pink coupons in the pigeon-hole are for 3666*l.*, send those to *Irving & Slade*" (brokers), "and he is to pay to *E. T.* 2500*l.*, the rest for the Archdeacon *G.* for *B.* and *E.*"

Testator died on the 13th of September, 1864. Certificates for 3666*l.* 13*s.* 4*d.* *Midland Railway* Stock were found. On the 2nd of November, 1864, an administrator was appointed, but the stock was not sold till the 22nd of November, 1865. Meanwhile a dividend had accrued:—

Held, that the gift of 2500*l.* to *E. T.* was a specific legacy, and that *E. T.* was entitled to a share of dividend, up to the time of sale, accruing on that portion of the stock which, at the death of the testator, would have been requisite to realize 2500*l.* *In re Jeffery's Trusts.* 68

LEGATEE, PECUNIARY.

See MARSHALLING.

LETTER BETWEEN DEFENDANTS.

See PRODUCTION OF DOCUMENTS, 4.

LIABILITY OF SOLICITOR FOR PARTNER.

See SOLICITOR.

LICENSE.

See EASEMENT.

LIEN OF SOLICITOR.

See SOLICITOR'S LIEN.

LIEN ON PROCEEDS OF TRUST FUNDS.

See SOLICITOR, MISAPPROPRIATION BY.

LIGHT.

1. There is no distinction between the right to light and air in regard to town houses and country houses: *Clarke* v. *Clark* (Law Rep. 1 Ch. 16) discussed.

The Plaintiff having proved that about one-half of the sky area which had previously been open to him was shut out by the Defendant's new building; and that he had been obliged, owing to the diminution of light, to remove his workmen from where they had formerly worked to another portion of his premises:—

Held, entitled to relief. But as part of the Defendant's building had been erected, and as no mandatory injunction was prayed, an inquiry was directed as to the amount of damages sustained by the Plaintiff. *Martin* v. *Headon.* 425

2. In order to support an injunction to restrain obstructions of light and air, it is generally necessary and sufficient that the case be one in which substantial damages would be recovered at law.

The dictum in *Clarke* v. *Clark* (Law Rep. 1 Ch. 16), which was supposed to have established a different rule in towns from that which prevails elsewhere, is overruled by *Yates* v. *Jack* (Law Rep. 1 Ch. 295).

Discussion of circumstances under which the Court will grant an injunction without summoning a jury; also as to distinctions between air and light.

The Court, when considering (as a jury) whether sufficient damage is proved to sustain an injunction, is not bound by the finding of the Appeal Court, upon somewhat similar facts, to the same extent as it is bound by a decision on a point of law. *Dent* v. *Auction Mart Company.* *Pilgrim* v. *The Same.* *Mercers' Company* v. *The Same.* 238

LIMITATIONS, STATUTE OF.

1. SECTIONS 25, 40:

A sum of money settled upon certain members, of a family was invested on mortgage of a trust term of the family estates. In 1829, on a resettlement of the estates, the subsistence of the term and the charge was acknowledged. No interest having been paid in the meantime, a family arrangement was executed in 1851, by which the tenant for life under the resettlement of 1829, acknowledged the

subsistence of the term and the charge, and afterwards paid interest thereon. The tenant in tail was not a party, being an infant:—

Held, as against the tenant in tail, that the term and the charge were subsisting, and that the *Statute of Limitations* did not apply. *Lawton* v. *Ford.* 97

2. A testator by settlement, executed on the marriage of his son, covenanted for payment by himself, his heirs, executors, or administrators, during his life, or three months after his decease, of a sum of 3000*l.* to the trustees of the settlement, with interest thereon till payment. The testator by his will devised certain real estates for payment of debts; and other real estates, then subject to an existing life interest, he devised to trustees in trust for his grandson for life, with remainders over. The grandson mortgaged his equitable life-interest for value. Interest was paid on the £3000 by the executors till 1849; but the £3000 not having been paid, and the personal estate, and estate devised for payments of debts, being exhausted, the trustees in 1863 instituted a suit to have the £3000 raised by sale of the devised estates:—

Held, that the £3000, though a debt due on covenant, and *debitum in præsenti solvendum in futuro*, was a debt within the statute 3 Wm. & M. c. 14.

That the fact that the testator had ample assets, did not take it out of the statute against fraudulent devises (3 Wm. & M. c. 14); it not being necessary under that statute, as it was under the statute of *Elizabeth* against fraudulent conveyances (13 Eliz. c. 5) that the devise should have been made with the intent to delay, hinder, or defraud creditors.

That the mortgage made by the grandson was not such an alienation as prevented the creditors from having their debts paid out of the estates in the hands of the alienee, the devisees in trust and not the equitable tenant for life, being the devisee within the meaning of that term in the statute of 3 Wm. & M. c. 14.

That, although some of the assets in the hands of the trustees might have been misapplied, the creditor was entitled to be paid out of any part of the estate, and therefore that was no reason why he should not be paid out of the devised estates, whatever remedies the devisees of those estates might have against the trustees for such misapplication.

That the fact that one of the original trustees with whom the covenant to pay the £3000 was entered into, who had been a receiver of the testator's estate during his lunacy, had not, out of moneys which he received as such receiver paid the debt due to himself and others under the covenant, was no bar to the present claim, he having no right to apply such moneys otherwise than as directed by the Court appointing him.

That the mortgagees could not be regarded as purchasers for value without notice.

That the fact of the interest having been paid on the £3000 by the trustees was sufficient to prevent the statute running in favour of the beneficial devisee—an executor in respect of the personalty, a devisee of estates devised for payments of debts in respect of such estates, and a beneficial devisee of realty, all coming within the term "party liable," under the 3 & 4 Wm. 4, c. 42, and payment by one being sufficient to prevent the statute running in favour of the rest.

That there had been no such laches as disentitled the Plaintiffs to relief.

The Court therefore declared the Plaintiffs entitled to have their debt raised by sale of the devised estate. *Coope* v. *Cresswell.* 106

3. A deed of settlement, establishing a banking company, contained a clause exonerating the transferror of shares from all liabilities in respect of his shares subsequently to the transfer; with a proviso that nothing contained in such clause should extend to release

the transferror from his proportion of losses sustained by the company up to the time of transfer.

There was also a clause providing that the directors should present a balance-sheet and general summary of accounts for every half-year, and also such further statement or report of the condition of the company as they should deem expedient, and every such balance-sheet or summary of accounts should be binding on the shareholders.

The directors never presented any balance-sheet or summary of accounts, but they produced a report half-yearly, in which the affairs of the company were mis-stated. A winding-up order was obtained:—

Held, that the transferrors of shares were liable for the losses which accrued prior to their transfers; and that the shareholders were not bound by the directors' reports.

One transfer of shares took place twenty-three years, a second nine years, and a third five years, before the winding-up:—

Held, that the liabilities were specialty debts, and that the *Statute of Limitations* applied only in the case of the first transfer. *In re Portsmouth Banking Company. Helby's, Stokes', and Horsey's Cases.* 167

4. After decree in an administration suit, the Court is not bound, on behalf of an absent party beneficially interested in the estate, to disallow claims against the estate barred by the *Statute of Limitations*, if the personal representative, and such of the persons beneficially interested as are parties to the suit, or have come in under the decree, do not set up the statute. *Alston* v. *Trollope.* 205

5. By the will of a testator who died in 1827, of which *W.* was sole executor, a legacy was bequeathed to *E.*, who died in 1830, having bequeathed her residuary personal estate to *W. E.'s* will was proved in 1835 by *W.*, who was afterwards found lunatic from the 3rd of December, 1840. On the 12th of October, 1848, administration with the will annexed of the testator's estate, during the lunacy was granted to *M. W.* died in 1857, and in December, 1858, a bill was filed for the administration of his estate. The legacy had never been paid. The *Statute of Limitations* which applies to the recovery of legacies passed in 1833:—

Held, that a present right to receive the legacy, within the 40th section of the statute, did not accrue to any one until the administration granted to *M.* in October, 1848; and hence that the right to sue for the legacy was not barred.

Where the person liable for the payment of a legacy, and the person entitled to receive it, are the same, no question of limitation under the statute can arise.

Where the executor of a testator is a mortgagee of the real estate, and also a legatee under his will, he is not bound to satisfy the mortgage debt out of the first sufficient sum of personal assets that comes to his hands; the reason being, that if he were compelled to do so, and thus to exhaust the personal estate, he would be entitled to come against the real estate to the extent to which the legacy remained unsatisfied. *Binns* v. *Nichols.* 256

LIQUIDATOR, APPOINTMENT OF PROVISIONAL

See CONTRIBUTORY, 2.

LLOYD'S BOND.

See MISREPRESENTATION OF LAW.

LOCKE KING'S ACT.

A sum of £400 borrowed by an intestate on his promissory note, but secured also by a memorandum and deposit of even date of title deeds of real estate in terms as collateral security:—

Held, within *Locke King's Act* (17 & 18 Vict. c. 113).

The heir-at-law, who paid the debts and funeral expenses out of his own moneys as a matter of bounty, but afterwards claimed to be allowed such payment out of the personal estate:—

Held, not entitled to be repaid. *Coleby* v. *Coleby*. 803

LUNATIC.

See ADEMPTION.
LIMITATIONS, STATUTE OF, 5.

MAINTENANCE, GIFT OF INCOME FOR.

A gift of the income to arise from a fund during the life of *A.* to *B.*, for his maintenance, is an absolute gift to *B.*, his executors and administrators, during the life of *A.*, and is not confined to the joint lives of *A.* and *B.*

A gift to the sisters of the testator living at a particular time, or the issue of any or either then dead, is not a substitutionary, but a substantive gift to the issue. *Attwood* v. *Alford*. 479

MANOR, LORD OF

See TRUSTEE ACT, 1850, 2.

MARGINAL RECEIPTS.

See BANKER'S LIEN.

MARRIED WOMAN.

See COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY.

MARRIED WOMAN, ACQUIESCENCE BY.

By a marriage settlement, it was declared that a sum of money, then in the hands of the lady's brother, should be held by the three trustees (one of them being the brother) upon trust, at the request in writing of the lady, to pay to her the whole or any part absolutely; and until such request, upon trust, when and as the same should come into their hands, to invest the same, and pay the interest to the wife for life, for her separate use, and after her decease as she should by will appoint, and in default of appointment to the husband. The money was allowed to remain for thirteen years in the hands of the brother, who paid the interest to the husband, and also paid him part of the principal, with the knowledge of the wife.

Upon the death of the husband, the wife filed a bill against the three trustees to compel them to replace the balance of the fund. The brother had become insolvent:—

Held, that the trustees were guilty of a breach of trust; but that the wife was debarred by acquiescence from claiming as against the two trustees, who had neglected to call in the money. *Jones* v. *Higgins*. 538

MARRIED WOMAN, DEBTS OF.

See SEPARATE ESTATE, LIABILITY OF,

MARRIED WOMAN, FRAUD BY.

See BEQUEST AVOIDED BY FRAUD.

MARRIAGE ARTICLES.

See ELECTION.

MARSHALLING.

Since the *Wills Act* a residuary devise of real estate can no longer be treated as specific.

A general pecuniary legatee has a right of marshalling as against the residuary devisee of real estate. *Hensman* v. *Fryer*. 627

See ERASURE IN WILL.

MASTER OF SHIP, INTERPLEADER BY.

See SHIP, PROCEEDINGS AGAINST.

MERCHANT SHIPPING ACT, 1854.

SECTIONS 510, 511, 512, 514.

Where the owner of a vessel which has wrongfully occasioned the loss of several of the crew of another vessel institutes proceedings under the *Merchant Shipping Act*, 1854, s. 514, that the amount of their liability may be determined, the damages sustained by the families of the deceased seamen are to be ascertained in the same way as if the liability of the owners were unlimited; and, if that amount exceeds the liability of the owner in respect of the tonnage of the ship, then the whole amount of his liability is to be distributed rateably among them.

The statutory limit of £30 as the amount of damages payable in respect of each family by section 510 of the Act, applies only to damages assessed under inquiries instituted by the Board of Trade. *Glaholm* v. *Barker.* 598

MERGER.

See PORTIONS.

METROPOLITAN BUILDING ACT, 1855.

The 83rd and 85th sections of the *Metropolitan Building Act*, 1855, do not apply to the case of the mere removal of a building from an adjoining building without disturbing the party structure, and no previous notice under the Act need in such case be given.

Semble, however, that if the building sought to be removed be so constructed that its support forms part of the party structure which separates the two buildings, such notice previous to removal would be necessary, although it were not the intention of the person removing the building to make use of the party structure in the erection of new buildings. *Major* v. *Park Lane Company.* 453

MINES AND MINERALS.

In lands held by copy of court roll, not at the will of the lord, but according to the custom of the manor, the freehold is in the lord; and in the absence of custom (the onus of establishing which lies upon the tenant) the tenant has no right to work the minerals.

The existence of a customary, compiled within the period of legal memory, is conclusive evidence against the existence of a custom not mentioned therein.

The customary of a manor, compiled within the period of legal memory, recognised a right in the tenants to dig coal "*propriis usis.*" It appeared, from subsequent documents, that the privilege of digging coal for their own consumption had been enjoyed by the tenants under the waste, but there was no evidence of a similar restricted enjoyment by the tenants under their customary inclosures. There was evidence of tenants having, during a long period, dug coal in their customary inclosures for sale:—

Held, that the custom was restricted to digging in the waste for coal for the tenants' own consumption, and that the tenants had no right of digging coals under their customary inclosures. *Duke of Portland* v. *Hill.* 765

MINES, OPEN AND UNOPENED.

A lease of land (without mentioning mines) will entitle the lessee to work open but not unopened mines. If there be open mines, a lease of land with the mines therein, will not extend to unopened mines; but if there be no open mines, a lease of land together with all mines therein, will enable the lessee to open new mines.

Where there was a conveyance to trustees of land, together with the mines thereunder, and a power to grant leases for fourteen years without mentioning mines:—

Held, that the trustees had no power

to grant leases of unopened mines. *Clegg* v. *Rowland.* 160

MISAPPROPRIATION.

See SOLICITOR, MISAPPROPRIATION BY.

MISREPRESENTATION.

See PROSPECTUS, MISREPRESENTATION IN, 1, 2.

MISREPRESENTATION OF LAW.

Plaintiff alleged, that being desirous of advancing money on debentures, he applied to a secretary of a railway company, who wrote, offering him a bond of the company for £1500, and stating that the company were not yet in a position to issue permanent debentures; but that they expected to be able to do so in four or five months' time. With the letter was sent a prospectus, from which it appeared that the company was incorporated by Act of Parliament, and that three persons named were directors. Plaintiff advanced the money, and received in return a *Lloyd's* bond, signed by the secretary, whereby the company purported to acknowledge the debt, and to covenant to pay the same with interest at 6 per cent.

The company having ceased to pay interest, and being in difficulties, Plaintiff filed a bill against two of the three directors, and the representatives of the third, praying that they might be decreed to pay the amount advanced by the Plaintiff with interest:—

Held, that the principle of relief on the ground of misrepresentation by third persons did not extend to an incorrect statement of a matter of law, and demurrer by the representatives of the third director allowed. *Rashdall* v. *Ford.* 750

MISTAKE.

See RELEASE.

MORTGAGE.

A creditor having agreed with his debtor to remit part of the debt upon having a mortgage to secure the payment of the balance within two years, without prejudice to his right to recover the whole debt if such balance were not paid within that time, the debtor executed a mortgage for such balance, containing a proviso that if the mortgage debt were not paid within the two years, the whole of the original debt should be recovered. The debt was not paid within the two years:—

Held, that the proviso was of the nature of a penalty, from which the mortgagor was entitled to be relieved in equity, and that the mortgagee could only recover the smaller sum.

Property was conveyed to trustees upon trust to raise by mortgage £75,000, and pay off prior mortgagees, whose mortgage debts, including arrears of interest, amounted to that sum. The trustees did not raise the £75,000, but allowed *A.* to pay off the prior mortgagees, and to take transfers of their mortgages, and then, in consideration of such payments, executed a deed purporting to assign to *A.* the £75,000 raisable under the trust, and to mortgage the property to *A.* for £75,000:—

Held, that *A.* was not entitled to stand as a mortgagee for the principal sum of £75,000, but only for the principal and interest due on the transferred mortgages. *Thompson* v. *Hudson.* 612

See EQUITABLE MORTGAGE OF SHARES IN MINE.

LIMITATIONS, STATUTE OF, 1.

MORTGAGE OF SHIP.

See FREIGHT, ASSIGNMENT OF.

MORTGAGE OF STOCK.

See STOCK MORTGAGE.

MORTGAGEE.

See LIMITATIONS, STATUTE OF, 5.
TRUSTEE, BONUS TO.

MULTIFARIOUSNESS.

A bill filed by one of the next of kin of an intestate against his administrator for the administration of the estate, and also seeking, as against other Defendants, to set aside a deed whereby the Plaintiff had assigned a portion of his interest in the estate for their benefit:—

Held, on demurrer by the administrator, to be multifarious. *Bouck* v. *Bouck*. 19

NEPHEWS, INCLUDING GRAND-NEPHEWS.

See CODICIL, WILL EXPLAINED BY.

NOTICE.

See APPROPRIATION OF CONSIGNMENTS TO BILLS.
FORGERY.
FREIGHT, ASSIGNMENT OF.

NUISANCE.

The Defendants, a canal company, incorporated by Act of Parliament, in 1772, and empowered by their Act to take water for the purposes of their undertaking from a stream then pure, but since become polluted by the proximity of numerous dwellings, was, with its lessees (whose lease was about to expire), indicted for a nuisance, in allowing the foul water to stagnate in the basin of their canal; and judgment for the Crown was entered up against the lessees, who, at the instance of the company, had given notice of appeal.

Upon an information being filed against the company and their lessees, the company, by their answer, admitting the polluted state of the water, but insisting on a right to use it however foul, and saying they should probably continue to draw the water into their canal upon the expiration of the lease in April, 1866:—

Held, that, the Court being of opinion that the decision at law was correct, the fact of an appeal pending at law was no bar to an injunction, though it might influence the decision of the Court as to the date at which the injunction should commence.

Held, further, that it was no answer to the prayer for an injunction to say that the company did not pollute the water, they having the power to draw it or not into their canal, as they pleased;

Nor to say that the informants might be left to their legal remedies; and case distinguished from *Wood* v. *Sutcliffe* (2 Sim (N. S.) 163);

Nor to say that by restraining the company, a worse nuisance would be created in the stream.

Delay may be a ground of defence to an information, but there are instances in which neither delay nor *laches* can be imputed to the Attorney-General, where it might have been imputed to an individual Plaintiff.

It was further *held* no answer to the prayer for injunction to say that the lessees were the active offenders, and not the company, inasmuch as the company had set up their rights by their answer: nor that the company might be obliged to close their canal, and expose themselves to an indictment on that ground: and

Injunction ordered; to commence eight months after the date of the decree. *Attorney-General* v. *Proprietors of the Bradford Canal*. 71

See HIGHWAY BOARD.

NUISANCES REMOVAL ACT, 1855 and 1860.

See HIGHWAY BOARD.

OBJECTIONS, PARTICULARS OF.

See PARTICULARS OF OBJECTION.

ORDER AND DISPOSITION.

See POLICY.

PAID-UP SHAREHOLDER, A CONTRIBUTORY.

The word "contributory," in sect. 133, art. 9, of the *Companies Act*, 1862, includes fully paid-up shareholders.

Consequently, where, under a voluntary winding-up, after all debts and costs had been provided for, a call had been made by the liquidators upon the partly paid-up shareholders purporting to be "to adjust the rights of the contributories amongst themselves," the object being to equalise the payments of the ordinary shareholders with the nominal advances of shareholders who had taken fully paid-up shares in exchange for property sold to the company:—

Held, that the call was valid. *In re Anglesea Colliery Company.* 379

PAPERS, DELIVERY UP OF.

See SOLICITOR'S LIEN.

PARCELS.

See FARM.

PARLIAMENTARY DEPOSIT.

An order can be made for the return of a Parliamentary deposit on the withdrawal of a railway bill, under the 9 & 10 Vict. c. 20, s. 5, upon production of a certificate signed by the Deputy Speaker of the House of Commons in the Speaker's absence. *Ex parte Stocksbridge Railway Bill.* 364

PARTICULARS OF OBJECTION.

In a suit to restrain the infringement of a patent for improvements in the construction of carriages, the alleged invention consisting of a particular mode of opening and closing the heads of carriages, particulars of objections stating that head-joints similar to those used in the Plaintiff's alleged invention had been, before the date of the patent, commonly used *by carriage builders generally throughout Great Britain*, and that head-joints, similar to those described in the specification, had been actuated in their motions in the way described, before the date of the patent, *by various carriage builders in or near London, Liverpool, Manchester, and Southampton, and various other of the principal towns of Great Britain*, were held insufficient.

Semble, that where the objection points to the public use of a particular preparation, the words "by various makers in or near *London*," might be sufficient.

Semble, also, if the Defendant could not give the names of the carriage-builders *in or near London, &c.*, he would be required to specify the class or classes of carriages with respect to which the alleged prior user had taken place; and that might have been held sufficient. *Morgan* v. *Fuller* (2). 297

PARTIES.

See AMENDMENT.
EQUITABLE MORTGAGE OF SHARES IN MINE.
SOLICITOR.

PARTIES TO CONVEYANCE.

See COVENANT FOR TITLE.

PARTNER, COMMON TO TWO FIRMS.

See APPROPRIATION OF CONSIGNMENTS TO BILLS.

PARTNERSHIP.

See EQUITABLE MORTGAGE OF SHARES IN MINES.

PARTNERSHIP BUSINESS.

See SOLICITOR.

PARTY LIABLE.

See LIMITATIONS, STATUTE OF, 2.

PARTY STRUCTURE.

See METROPOLITAN BUILDING ACT, 1855.

PATENT.

1. The Defendant in a suit to restrain the infringement of a patent is entitled to dispute the validity of the patent, although the Plaintiff has obtained a judgment at law against another person establishing its validity; but until he has proved its invalidity, he will be restrained from infringing it.

In a suit to restrain the infringement of a patent, the validity of which had been established at law against another Defendant, the Court at the hearing, being satisfied of the sufficiency of the specification, the utility of the invention, and the fact of infringement, granted an injunction to restrain the Defendant from infringing the patent, and directed an issue to be tried at law as to the novelty of the invention.

An objection to the validity of a patent on the ground of the expiration of a foreign patent for the same invention cannot be taken at the hearing of a suit to restrain the infringement of the patent, unless it has been raised by the answer. *Bovill* v. *Goodier* (2). 195

2. A Defendant will not be allowed to add a totally new issue of fact not in any way suggested by his answer to the issues which have been already directed for trial.

Semble, that in order to raise such new issue the Defendant must file a supplemental answer. *Morgan* v. *Fuller* (1). 296

3. Upon the trial of issues in a patent case the Plaintiff is entitled to call evidence in reply, for the purpose of rebutting a case of prior user set up by the Defendant.

But after the evidence for the defence has been summed up, the Defendant will not be allowed to adduce further evidence in answer to that given by the Plaintiff in reply. *Penn* v. *Jack and Others.* 314

See DISCOVERY, 1.
PARTICULARS OF OBJECTION.

PAYMENT INTO COURT.

See INJUNCTION, INTERLOCUTORY.

PAYMENT TO FOREIGN INFANT.

See DOMICIL, 2.

PENALTY.

See INTEREST.
MORTGAGE.

PERSONAL ESTATE, BEQUEST OF.

A testator who had purchased a leasehold interest, which was assigned to him, and subsequently the reversion in fee, which was conveyed to a trustee for himself subject to the lease, made a will in these terms:—"I appoint my wife my administrator; I give to my said wife *the whole of my personal property, estate, and effects, of every and whatsoever kind they may be*":—

Held, that the reversion in fee did not pass under the will:

Held, also, that the term passed under the will as a term in gross, and not attendant on the inheritance. *Belaney* v. *Belaney.* 210

PERSONALTY, LIMITATION OF, BY REFERENCE TO REALTY.

Testator bequeathed freeholds to trustees and their heirs, to the use of his nephew for life, remainder to the use of his first son in tail male, with remainders over. He gave to the same trustees leaseholds, in trust for *such person or persons as should for the time being be entitled to the several freehold hereditaments* thereinbefore devised, to the end that the said leaseholds might

go along with, and be held and enjoyed by the person or persons who, for the time being, should be entitled to the said freehold hereditaments, so far as the nature of the said leaseholds, and the rules of law and equity, would permit; but no person taking an estate tail by purchase in the freeholds was, for the purpose of transmission to representatives, to become absolutely entitled to the leaseholds until twenty-one. He devised to the same trustees and their heirs copyholds upon trust to permit and suffer the same *to be held and enjoyed by such person or persons as for the time being should become seised of or entitled unto any estate of freehold or inheritance* of and in the said freehold hereditaments, for and during so long time as the rules of law and equity would permit. Power was reserved by the will to certain persons to cut timber; and the trusts of the timber money, when invested, were declared to be, to pay the income *to such person or persons as for the time being would be entitled to the rents and profits of the freehold hereditaments.* Testator further directed his trustees, out of his personalty, to set apart 10,000*l.*, and invest the remainder (after payment of his debts), and pay the dividends and interest thereof *from time to time as the same should become due and be received, unto such person or persons as for the time being should be entitled to the rents and profits of his freehold hereditaments* thereinbefore devised; and in case of failure of the issue of certain persons, upon trust to transfer what should remain of the said personal estate to a college:—

Held, that the personal estate vested absolutely in the first tenant in tail.

The Court will look to the general intention of a testator that the personal estate shall go with the realty, rather than to an apparent intention on his part to limit the personalty to an extent not permitted by law. *In re Johnson's Trusts.* 716

PETITIONS, SEVERAL, COSTS OF.

See Costs on Winding-up Petitions, 2.

PETITION, WINDING-UP.

See Winding-up, 2.

PLANS.

See Production of Documents, 3.

PLEA, EQUITABLE.

See Equitable Plea.

PLEA TO WHOLE BILL.

Defendants filed a plea of bankruptcy, and the Plaintiffs, by taking none of the steps pointed out by *Consolidated Order XIV., rule* 17, gave Defendants the right to obtain, as of course, an order to dismiss the bill. The Defendants not availing themselves of such right, the Plaintiffs subsequently obtained in Chambers an order to amend, in the presence of Defendants' solicitor, who objected, but was told that the order to amend would not prejudice his clients:—

Held, notwithstanding this laches on the part of their solicitor, that the Defendants were entitled, upon motion for that purpose, to have the order to amend discharged, but without costs, and bill dismissed with the same costs as if plea allowed on hearing. *Campbell* v. *Joyce.* 377

PLEADING.

See Discovery, 1.
Foreign State.
Multifariousness.
Patent, 2.
Solicitor.

PLEDGE BY FACTOR.

See Factors' Acts.

POLICY.

The Defendants assigned certain machinery by bill of sale to secure a sum of money advanced by the Plain-

tiff. The deed contained a covenant to insure, but no provision for the application of the policy moneys in case of fire, in liquidation of the mortgage debt. The machinery was burnt, and the Defendants became bankrupts :—

Held, that the Plaintiff had no claim to the benefit of the policy as against the Defendants.

After the fire the Defendants executed an assignment of property to their creditors under the *Bankruptcy Act*, but the deed was destroyed before any of the creditors had signed it. The Plaintiff, with the knowledge of that deed, gave the insurance office notice of his claim to the policy :—

Held, that the deed of assignment was an act of bankruptcy ; and that the policy being in the order and disposition of the bankrupts at the time of the notice to the insurance office, the Plaintiff on this ground also had no claim to the proceeds of the policy as against the assignees. *Lees* v. *Whiteley*. 143

See TRUSTEE RELIEF ACT, COSTS UNDER.

POLLUTION OF CANAL.

See NUISANCE.

PORTIONS.

Where four portioners, entitled each to a fifth of a portions fund, became entitled in undivided shares to the estate upon which the portions fund was charged, the entire estate being also subject to a mortgage :—

Held, that no one of the portioners could claim the right of having the whole fund divided, and thrown in fourths upon the respective shares, in order that, by payment of the difference between what was chargeable on her share of the estate, and what was due to her in respect of the portion, her share of the estate might be cleared :

But *held* further, that such a proposal was a proper subject for arrangement in Chambers ; and upon bill filed by a portioner under the above circumstances to have her share in the estate discharged, and to have the trusts of the portions term administered by the Court, leave was given to the Plaintiff to bring into Chambers a scheme for the purpose. *Otway-Cave* v. *Otway*. 725

POWER.

See APPOINTMENT BY RESIDUARY GIFT.
DEMONSTRATIVE LEGACY.
HEIRS OF BODY READ NEXT OF KIN DESCENDED.

POWER, PROPERTY SUBJECT TO.

See SEPARATE ESTATE, LIABILITY OF.

POWER, TRUST IMPLIED FROM.

By a post-nuptial settlement, certain freehold property was conveyed to trustees upon trust to pay the rents to *W.* and his wife during their lives, and after the decease of the survivor upon trust to sell and divide the proceeds amongst all and every the children of *W.*, in such shares and proportions as he should by will appoint. There were seven children living at the date of the settlement, one of whom died before *W.*, who died without executing the appointment :—

Held, that the property was vested in all the children, liable to be divested by the execution of the power ; and the power not having been executed, the representatives of the deceased child were entitled to his share. *Lambert* v. *Thwaites*. 151

PRACTICE.

See AMENDMENT.
CONTRIBUTORY, 2.
COSTS OF READING DEPOSITIONS TAKEN ABROAD.
COSTS, SECURITY FOR.
COSTS ON WINDING-UP PETITIONS, 1.
COVENANT FOR TITLE.
CROSS-EXAMINATION.

PRACTICE—(*continued*).

DOCUMENTS, AFFIDAVIT OF.
DOMICIL, 2.
EVIDENCE, ORDER TO READ.
EXAMINER, PROCEEDINGS BEFORE.
INQUISITION, LEAVE TO TRAVERSE.
INTERROGATORIES BY DEFENDANT.
PATENT, 1, 2, 3.
PLEA TO WHOLE BILL.
PORTIONS.
PRODUCTION OF DOCUMENTS, 1.
REVIVOR AFTER INTERROGATORIES FILED.
SOLICITOR, UNCERTIFICATED.
WINDING-UP, 1, 3.

PRE-EMPTION OF SUPERFLUOUS LANDS.

See SUPERFLUOUS LANDS.

PRESCRIPTION.

See CHANCEL.

PRIORITY.

See FREIGHT, ASSIGNMENT OF.

PRIVILEGE.

See PRODUCTION OF DOCUMENTS, 4.

PROCEEDINGS, LEAVE TO CONTINUE AFTER WINDING-UP.

See EXECUTION AFTER WINDING-UP.

PRODUCTION OF DOCUMENTS.

1. A *subpœna duces tecum* requiring a solicitor, not a party to the suit, to produce all papers, &c., relating to all dealings and transactions between his firm and the Plaintiffs or Defendants (as the case may be), for a period of thirty years, without specifying any particular documents required, is too vague, and the witness is entitled to refuse production. But if the witness, who has been served with a subpœna in this general form, admits that he has in his possession "the documents thereby required," he must produce them, and cannot insist upon being first sworn. *Lee* v. *Angas.* 59

2. In answer to an order against a company, its directors, managing director and secretary, for the production of documents, the directors filed affidavits stating that they had not in their possession or power any documents other than those which might be in the possession of the company. They afterwards made further affidavits, in which they stated that they had no documents whatever in their possession or power:—

Held, that the affidavits were insufficient; and that the Defendants were bound to give upon oath all the information in their power, as to the documents in possession of their company. *Clinch* v. *Financial Corporation.* 271

3. Where the issue in a cause depended in a great measure upon the state of the originals of certain engineering plans and documents, and the Defendant deposed that he was not possessed of any engineering knowledge, and that an inspection of the documents would be useless to him without the aid and assistance of an engineer, the order for production and inspection of documents was directed to extend to the Defendant's surveyor. *Swansea Vale Railway Company* v. *Budd.* 274

4. A case for the opinion of counsel, stated in reference to a separate litigation about the same subject-matter as the present dispute, and after it had arisen:—

Held, privileged from production.

A letter written between co-Defendants respecting a matter in litigation, with direction to forward it to their joint solicitor:—

Held, privileged from production. *Jenkyns* v. *Bushby.* 547

PROMOTERS.

The articles of association of a banking company, with a nominal capital of 1,200,000*l.*, in 60,000 shares, of which the prospectus stated that the first issue would be 30,000, empowered the

directors to commence business as soon as they thought fit, notwithstanding the whole capital might not have been subscribed for; and provided that upon the first allotment of shares 10,000*l.* should be paid to the promoters. Six weeks after the formation of the company, 5319 shares only having been subscribed for, of which 800 were subscribed for by four directors, the directors allotted the shares, and paid 5000*l.* to the promoters, of which 2000*l.* was, in pursuance of an agreement made before the formation of the company, but not noticed in the articles of association, applied in paying the deposits on the 800 shares of the four directors:—

Held, that the concealment of the agreement between the promoters and the four directors released the shareholders from their contract with the promoters contained in the articles, and also that in making the allotment of shares the directors could not under the circumstances be considered to have exercised their discretion *bona fide*; and on these grounds a claim by the promoters in the winding-up of the company for the balance of the 10,000*l.* was disallowed. *In re Madrid Bank. Ex parte Williams.* 216

See JURISDICTION.

PROMOTION MONEY DISALLOWED.

See PROMOTERS.

PROSPECTUS AND MEMORANDUM, VARIANCE BETWEEN.

A. was induced by the statements contained in the prospectus to apply, in April, 1865, for shares in a company, and in answer to his application received a letter of allotment. *A.* made the further payment required by the prospectus, and in June, 1865, received in exchange for the banker's receipt a certificate that he was the proprietor of fifteen shares in the company, "subject to the provisions of the memorandum and articles of association, and to the rules and regulations of the said company."

The objects of the company as stated in the memorandum and articles of association were more extensive than those stated in the prospectus.

A. never attended any meeting of shareholders, and did not see the memorandum or articles of association until May, 1866:—

Held, that he was entitled to have his name removed from the register, as the terms of the certificate did not amount to notice that he had entered into a new contract, or that the objects of the memorandum and articles were more extensive than those of the prospectus on the faith of which he applied for shares. *In re Russian (Vyksounsky) Ironworks Company. Webster's Case.* 741

PROSPECTUS, MISREPRESENTATION IN.

1. A company was formed for mining purposes: the prospectus referred to the memorandum and articles, and described in favourable terms a mine for the purchase of which a contract had been entered into. This mine was afterwards found to be worthless, and the directors rescinded the contract, and agreed to purchase another:—

Held, that a shareholder who had subscribed on the faith of the prospectus was entitled to an injunction against an action for calls, although the directors had been themselves deceived, and had been guilty of no wilful fraud. *Smith* v. *Reese River Company.* 264

2. A contract to take shares in a company cannot be set aside because it was founded on a prospectus which contains exaggerated views of the advantages of the company, but does not contain any material misstatement of fact.

Where, therefore, a prospectus stated that a certain invention which it was the object of the company to work had

been tested, and that according to the experiments the material could be produced at a specified cost, but that it was intended to test the invention further, and the invention turned out worthless, and it appearing that there had been some testing:—

Held, that this was not such a misrepresentation as would enable a purchaser of shares to set aside the contract. *Denton* v. *Macniel.* 352

PROVISIONAL REGISTRATION.

See JURISDICTION.

PROVISO FOR REVIVING DEBT ON DEFAULT IN PAYMENT OF PART.

See MORTGAGE.

PUBLIC CONVENIENCE.

See RAILWAY COMPANY.

PUBLIC HOUSE.

Upon a purchase of land, the purchaser covenanting with the vendors not to carry on upon the property certain offensive trades or any business which was or might be deemed a public or private nuisance, nor to use any building which should be erected thereon "as a public-house for the sale of beer, wine, malt liquors, or spirits":—

Held, that the sale of beer by retail, under a license "not to be drunk on the premises," was no breach of the covenant. *Pease* v. *Coats.* 688

QUALIFICATION OF DIRECTOR.

See CONTRIBUTORY, 7.

RAILWAY COMPANY.

It is a ground for refusing specific performance of an agreement, that such specific performance may interfere with the safety or convenience of the public.

Therefore, where a railway company agreed with a landowner to execute certain accommodation works, and having made the railway at such a level as to render it impossible for them to execute the works according to the agreement, so executed them as to give the landowner a less convenient approach to his house, the Court refused, after the railway had been opened for public use, to decree the specific performance of the agreement, which would have involved the alteration of the level of the railway, although the works were not completed, nor the railway opened, until after the filing of the bill, and after a motion for an injunction to restrain the completion of the works had been made and ordered to stand over upon an undertaking by the company to deal with the works as the Court should direct.

A railway company agreed, under seal, with the vendor of lands taken by them, to make and maintain certain accommodation works:—

Held, that the vendor was not entitled to have a covenant by the company in the terms of the agreement inserted in the conveyance of the land to the company. *Raphael* v. *Thames Valley Railway Company.* 37

See CONTRACTOR'S PLANT, FORFEITURE OF.
MISREPRESENTATION OF LAW.
TRAFFIC AGREEMENT.

RAILWAY COMPANY, ORDER FOR SALE AGAINST.

Upon Petition by a judgment creditor of a railway company who had extended the lands (including superfluous lands) of the company under an *elegit*, for a sale under the *Judgment Law Amendment Act*, 1864, the Court directed, 1, inquiries; and 2, in default of payment of the debt and costs within a month of the date of the certificate, a sale under the direction of the Court of the interest of the company in the

lands, or so much thereof as might be necessary to satisfy the Petitioner's claim. *In re Hull and Hornsea Railway Company.* 262

REAL OR PERSONAL ESTATE.

See CONVERSION.

REALTY, ADMINISTRATION OF.

See COSTS IN ADMINISTRATION.

REDEMPTION.

See STOCK MORTGAGE.

REGISTER, RECTIFICATION OF.

See CONTRIBUTORY, 1, 5, 6.
PROSPECTUS AND MEMORANDUM, VARIANCE BETWEEN.

REGISTRATION OF TITLE.

See LAND TRANSFER ACT.

RELEASE.

Where a release in terms extends to sums of money which the releasee has openly, but without justification, taken from the releasor, the latter cannot file a bill in equity to compel the releasee to pay these sums, though at the time the release was given the releasor was in fact ignorant of the fraud committed by the releasee. The remedy of the releasor in such a case is to have the release set aside *in toto;* and if, in consequence of dealings subsequent to the release, that cannot be done, the releasor can have no relief in equity. *Skilbeck* v. *Hilton.* 587

REMEDY AT LAW.

See JURISDICTION.

REMOTENESS.

See "SURVIVE."

REPAIR OF CHANCEL.

See CHANCEL.

RESIDUE.

See EXECUTORS, GIFT TO ONE OF.

REVIVOR, AFTER INTERROGATORIES FILED.

In a suit relating to real and personal estate, where, after interrogatories filed, but before answer, the sole Plaintiff had died, the Court, on the application of the heir at law, who was also the executor of the deceased Plaintiff, made an order to revive, and as the time for answering had expired, ordered that the Defendant should, within twenty-eight days, answer the interrogatories. *Earl Beauchamp* v. *Winn.* 302

SALE, ORDER FOR, AGAINST RAILWAY COMPANY.

See RAILWAY COMPANY, ORDER FOR SALE AGAINST.

SALE UNDER DECREE.

See COVENANT FOR TITLE.

SECURITY FOR COSTS.

See COSTS, SECURITY FOR.

SEPARATE ESTATE.

See COVENANT TO SETTLE AFTER ACQUIRED PROPERTY.
"SOLE USE."

SEPARATE ESTATE, LIABILITY OF.

Property settled to the separate use of a married woman for life, with a power to appoint the reversion by deed or will, which she exercises by will, is not liable after her death to the payment of her debts.

Semble, the separate property of a married woman is not liable after her death to her general engagements.

Semble, in the administration of the separate estate of a married woman after her death, her debts should be paid in order of priority.

Observations on *Johnson* v. *Gallagher* (30 L. J. (Ch.) 298). *Shattock* v. *Shattock*. 182

SEPARATE USE.

A testator gave all his real and personal estate to trustees in trust for his wife for life, and after her decease for his daughter absolutely; and he directed that the principal moneys, rents, issues, profits, interest, dividends, and proceeds which his wife and daughter, or either of them, should be entitled to under his will, should be paid into their own proper hands as the same became due, and not by way of anticipation; and should be for the separate use and benefit of his wife and daughter; and for which moneys, rents, issues, profits, interest, dividends, or proceeds, the receipt alone of his wife and daughter, whether covert or sole, should be an effectual discharge to his trustees:—

Held, that the *corpus* of the real estate was not given to the separate use of the testator's daughter. *Troutbeck* v. *Boughey*. 534

See SOLE USE.

SEPARATION DEED.

In a separation deed the husband covenanted with trustees to allow his wife 50*l.* a-year for her support; he being indemnified against all debts and liabilities on her account, and it being agreed on her behalf that she would not in any way endeavour to compel the husband again to live with her, or to allow her "any further, or greater, or other support, maintenance, or alimony," than the annuity of 50*l.*:—

Held, that in the absence of any act shewing an unqualified acceptance by the wife of the provisions of the separation deed, or of any attempt to enforce it against her husband, the Court would not, upon interlocutory motion, restrain her from proceeding in the Divorce Court to obtain an allowance for alimony, as incident to her Petition for a judicial separation on the ground of cruelty, but the Court put her under an undertaking to deal with the alimony as this Court should direct. *Williams* v. *Baily*. 731

SERVICE OUT OF JURISDICTION.

The Court has now, under the General Orders, jurisdiction to direct service of its process abroad. The decisions of *Cookney* v. *Anderson* (1 D. J. & S. 365) and *Foley* v. *Maillardet* (1 D. J. & S. 389) are at variance with the General Orders, which have the force of a statutory enactment. *Drummond* v. *Drummond*. 335

SET-OFF.

See BANKER'S LIEN.

SETTING ASIDE DEED.

See RELEASE.

SETTLED ACCOUNT.

See TRUSTEE, BONUS TO.

SETTLED ESTATE.

See LEASES AND SALES ACT.

SETTLEMENT.

By a voluntary deed a settlor gave property to *A.*, *B.*, *C.*, and *D.*, in equal shares. He provided that if any of the four *should die* in his lifetime leaving specified issue, the share of him or her so dying should be in trust for the children of him and her so dying; and that if any of the four *should die* in his lifetime, without leaving such issue,

the share of him or her so dying should go over and accrue and be added to the other shares. *A.* and *B.* were dead at the date of the settlement, the former leaving issue, the latter without issue:—

Held, that the gifts over of the shares of *A.* and *B.* did not fail by reason of their being dead at the date of the settlement. *Barnes* v. *Jennings*. 448

See COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY.

SETTLEMENT.

See ELECTION.
POWER, TRUST IMPLIED FROM.

SETTLEMENT, TRUSTS OF.

See DEVISE "SUBJECT TO THE SAME CONDITIONS" AS OTHER SHARES WHICH WERE SETTLED.

SHAREHOLDER, LIABILITY OF.

See LIMITATIONS, STATUTE OF, 3.

SHAREHOLDER, PREPONDERATING INFLUENCE OF.

Where a special resolution had been passed (but not confirmed) for the voluntary winding-up of a company, upon a Petition by a shareholder for a compulsory winding-up order, alleging that the company had been got up for the purpose of improving the property bought by the company, in order that the same might revert in its improved condition to the actual vendor, who held five times as many shares in the company as all the other shareholders together:

The Court, finding that there was a conflict between the parties, and that there were matters which required investigation, refused to give effect to the resolution of the company, on the ground of the preponderating influence of the single shareholder; and made the ordinary winding-up order. *In re West Surrey Tanning Company*. 737

SHARES, ACCEPTANCE OF.

See CONTRIBUTORY, 4.

SHARES, PAYMENT IN.

See CONTRIBUTORY, 3.

SHARES, UNREGISTERED PURCHASER OF.

See CONTRIBUTORY, 1, 5, 6.

SHELLEY'S CASE, RULE IN.

Devise of freehold houses unto *A.*, *B.*, and *C.*, in equal shares, during only their natural lives, "and after their decease I give and bequeath the said freehold estate unto the next lawful heir of *A.* all the said freehold estate for ever:"—

Held, that the limitation fell within the rule in *Shelley's Case* (1 Rep. 93), and that *A.* took an estate in fee simple. *Fuller* v. *Chamier*. 682

See CY PRÈS.

SHIP, PROCEEDINGS AGAINST.

Where a suit has been instituted in the Court of Admiralty by arrest of a ship, on behalf of a person claiming to be the owner of goods, on the ground of breach of duty on the part of the master in not delivering the goods to him; and a like proceeding has been instituted in the same Court by another claimant in respect of the same goods:—

Semble, a bill of interpleader by the captain of the ship will not lie, on the grounds—1. That the proceedings are not against him, but against the ship; and 2. That the Court of Admiralty has jurisdiction to decide the whole question.

What acts on the part of a master of a ship will amount to a sufficient acknowledgment of title on his part to deprive him of the right to file a bill for interpleader against two persons, both claiming to be owners of the

same goods, part of the ship's cargo—discussed. *Sablicich* v. *Russell.* 441

SHIPOWNER, LIABILITY OF.

See MERCHANT SHIPPING ACT, 1854, ss. 510, 511, 512, 514.

SOLE PLAINTIFF, REVIVOR ON DEATH OF.

See REVIVOR AFTER INTERROGATORIES FILED.

"SOLE USE."

A testator being seised of trust estate, by his will, after reciting that he was or might at the time of his death be seised, or possessed, or entitled to real and personal estate, devised all and singular his said real and personal estate to *H.*, her heirs, executors, administrators, and assigns, for her and their own sole and absolute use and benefit. *H.* was a *feme sole* :—

Held, that the devise to *H.* included the trust estates, and that the words did not create a separate estate. *Lewis* v. *Mathews.* 177

SOLICITOR.

Where one of a firm of solicitors received from a client a sum of money for which a receipt was given in the name of the firm, stating that part of the money was in payment of certain costs due to the firm, and that the residue was to make arrangements with the client's creditors, and the solicitor misappropriated the money :—

Held, that the transaction with the client was within the scope of the partnership business; and that the partners in the firm were jointly and severally liable to make good the amount :

Held also, that all the partners were necessary parties to a suit for that purpose. *Atkinson* v. *Mackreth.* 570

See FORGERY.

SOLICITORS' LIEN.

Where a partner of a trading firm, which had become bankrupt, was also one of the firm of solicitors whom the trading firm had employed in the conduct of suits which were pending at the time of bankruptcy, and the assignees in bankruptcy had retained other solicitors :—

Held, that the assignees in bankruptcy were not entitled to an order for a delivery up to the assignees of the papers in the solicitors' possession subject to their existing lien. *In re Moss.* 345

SOLICITOR, MISAPPROPRIATION BY.

A solicitor having in his possession the title deeds of an estate mortgaged to his client, deposited the deeds with his banker as security for an advance, which he applied in the purchase of an estate on his own behalf. When the mortgage was paid off, he applied that money in repaying the loan from his banker, and informed his client that he had re-invested the mortgage money upon other good security. His client thereupon executed a re-assignment of the mortgage; but in fact the solicitor never re-invested the money, although he continued to pay interest upon it until his death :—

Held, that the client was entitled to a lien upon the estate so purchased by the solicitor. *Hopper* v. *Conyers.* 549

SOLICITOR, UNCERTIFICATED.

Proceedings taken on behalf of a Defendant by a solicitor who had not at the time renewed his annual certificate, will not be set aside as irregular; the right of the solicitor to recover his fees, and not the interest of the client (who is not bound to ascertain if his solicitor is duly qualified to practise), being alone affected by the want of proper qualification. *Sparling* v. *Brereton.* 64

SPEAKER'S CERTIFICATE.

See PARLIAMENTARY DEPOSIT.

SPECIALTY DEBT.

A. being indebted to *B.* on simple contract, gave a promissory note for the amount, and executed a deed by which, after reciting the debt and the note, he, as further security, charged certain property with the payment of it, and agreed to execute such a mortgage of the property, with all powers, covenants, and clauses incidental thereto, as *B.* should require :—

Held, that the deed converted the debt into a specialty debt. *Saunders* v. *Milsome.* 573

See LIMITATIONS, STATUTE OF, 3.

SPECIFIC LEGACY.

Testator being at the time possessed of 1000*l.* guaranteed stock in the *N. B. Railway*, bequeathed to *A.* "my one thousand *N. B. Railway* preference shares." After his will he sold his *N. B.* guaranteed stock, and died possessed of shares and stock in the *N. B. Railway*, acquired by several successive purchases, exceeding the amount bequeathed to *A.* :—

Held, that the bequest, being of a specific thing, which had been adeemed, and was not in the testator's possession at the time of his death, a "contrary intention," so as to exclude the operation of 1 Vict. c. 26, s. 24, sufficiently appeared upon the will, and that *A.* was not entitled to have his legacy satisfied out of the *N. B. Railway* shares and stock in the testator's possession at the time of his death. *In re Gibson. Mathews* v. *Foulsham.* 669

See ADEMPTION.

SPECIFIC PERFORMANCE.

See DAMAGES.
DISCOVERY, 2.
EASEMENT.
EQUITABLE PLEA.
INTEREST.
RAILWAY COMPANY.

STATUTES.

3 WM. & M. c. 14.

See LIMITATIONS, STATUTE OF, 2.

6 GEO. 4, c. 94.

See FACTORS' ACTS.

3 & 4 WILL. 4, c. 27.

See LIMITATIONS, STATUTE OF, 1—5.

4 & 5 WILL. 4, c. 22 (APPORTIONMENT ACT).

See APPORTIONMENT.

1 VICT. c. 26 (WILLS ACT).

See MARSHALLING.

Section 15.

See ERASURE IN WILL.

Section 24.

See SPECIFIC LEGACY.

5 & 6 VICT. c. 39 (LAW OF MERCHANTS ACT AMENDMENT).

See FACTORS' ACTS.

6 & 7 VICT. c. 73 (SOLICITORS' ACT).

See SOLICITOR, UNCERTIFICATED.

7 & 8 VICT. c. 110 (JOINT STOCK COMPANIES REGISTRATION ACT).

See JURISDICTION.

8 & 9 VICT. c. 18 (LANDS CLAUSES ACT), s. 128.

See SUPERFLUOUS LANDS.

9 & 10 VICT. c. 20, s. 5 (RAILWAY DEPOSITS ACT).

See PARLIAMENTARY DEPOSIT.

STATUTES.

10 & 11 Vict. c. 96, s. 1.
See Trustee Relief Act, Costs under.

13 & 14 Vict. c. 60 (Trustee Act, 1850).
See Trustee Act, 1850, 1, 2.

15 & 16 Vict. c. 86 (Chancery Amendment Act).
Section 32.
See Examiner, Proceedings before.

Section 40.
See Cross-examination.

Section 52.
See Revivor after Interrogatories filed.

17 & 18 Vict. c. 104 (Merchant Shipping Act, 1854).
See Merchant Shipping Act, 1854, ss. 510, 511, 512, 514.

17 & 18 Vict. c. 113.
See Locke King's Act.

18 & 19 Vict. c. 121 (Nuisances Removal Act, 1855).
See Highway Board.

18 & 19 Vict. c. 122.
See Metropolitan Building Act, 1855.

19 & 20 Vict. c. 120 (Settled Estates Act), s. 1.
See Leases and Sales Act.

21 & 22 Vict. c. 27 (Cairns' Act).
See Damages.

23 & 24 Vict. c. 77 (Nuisances Removal Act, 1860).
See Highway Board.

23 & 24 Vict. c. 127 (Solicitors' Act).
See Solicitor, Uncertificated.

24 & 25 Vict. c. 134 (Bankruptcy Act, 1861).
Section 110.
See Trustee Act, 1850, 1.

Section 192.
See Composition Deed.

25 & 26 Vict. c. 53.
See Land Transfer Act.

25 & 26 Vict. c. 89 (Companies Act, 1862).
Section 35.
See Prospectus and Memorandum, Variance Between.

Sections 35, 98.
See Contributory, 1.

Section 69.
See Costs, Security for.

Sections 85, 87, 162.
See Execution after Winding-up.

Section 133, Art. 9.
See Paid-up Shareholder a Contributory.

Section 153.
See Contributory, 2, 5.

25 & 26 Vict. c. 89.
See Winding-up, 2.

27 & 28 Vict. c. 112 (Judgment Law Amendment Act), s. 4.
See Railway Company, Order for Sale against.

STAYING PROCEEDINGS TILL PLAINTIFF'S ANSWER.

See INTERROGATORIES BY DEFENDANT.

STEPDAUGHTER, BEQUEST TO SUPPOSED.

See BEQUEST AVOIDED BY FRAUD.

STOCK MORTGAGE.

On a stock mortgage for a term of years for securing the purchase of stock at the end of the term, and securing payment in the meantime of interest calculated on the proceeds of the stock sold for the mortgage, the mortgage having been suffered by the mortgagee to continue after the term, and the price of the stock having fallen :—

Held, that in a redemption suit the mortgagee was not entitled to the market value of the stock at the end of the term ; but that the mortgagor was entitled to redeem on purchasing the stock, and paying interest to the time of purchase, and costs. *Blyth* v. *Carpenter.* 501

STRANGER, MISREPRESENTATION BY.

See MISREPRESENTATION BY LAW.

STREAM, POLLUTION OF.

See NUISANCE.

SUBPŒNA DUCES TECUM.

See PRODUCTION OF DOCUMENTS, 1.

SUBSTITUTIONARY OR ORIGINAL GIFT.

See MAINTENANCE, GIFT OF INCOME FOR.

SUPERFLUOUS LANDS.

The right of pre-emption of superfluous lands under the 128th section of the *Lands Clauses Consolidation Act*, 1845, is not confined to the proprietors from whom the company purchased, but devolves to future proprietors of the lands from which the purchased lands were severed.

The words, "lands situate within a town," in the same section, mean lands surrounded by the buildings which constitute the town ; and therefore, lands outside those buildings, although within the borough boundary, are not within the exception of the section, and the fact that a cottage stood upon a field, part of such superfluous lands, *held* not to bring them within the exception of "lands built upon, or used for building purposes." *Carington v. Wycombe Railway Company.* 825

SURVEYOR, INSPECTION BY.

See PRODUCTION OF DOCUMENTS, 3.

"SURVIVE."

The words "survive," and "survivor," import that the person who is to survive must be living at the time of the event which he is to survive. Therefore a gift over in default of children or remoter issue of *A.*, who should survive *A.* :—

Held, not void for remoteness. *Gee* v. *Liddell.* 341

TAXATION.

See COSTS, HIGHER OR LOWER SCALE.

TENANT IN TAIL.

See PERSONALTY, LIMITATION OF, BY REFERENCE TO REALTY.

TERM IN GROSS.

See PERSONAL ESTATE, BEQUEST OF.

TERM OF YEARS.

See LIMITATIONS, STATUTE OF, 1.

THIRD COUNSEL.

See COSTS OF READING DEPOSITIONS TAKEN ABROAD.

TIME FOR FILING INTERROGATORIES BY DEFENDANT.

See INTERROGATORIES BY DEFENDANT.

TOWN.

See SUPERFLUOUS LANDS.

TRAFFIC AGREEMENT.

The managing body of a railway company has no power to enter into a contract fixing and regulating the future traffic which may be carried upon a line of railway which the company may thereafter be empowered to construct, so as to give to another railway company an interest in such traffic and profits.

The Court will not by implication import conditions, not expressed, into an agreement, unless there is something in the agreement which shews that the parties must have intended such conditions. *Midland Railway Company* v. *London and North Western Railway Company.* 524

TRANSFER.

See CONTRIBUTORY, 2, 5, 6.

TRUST.

See EXECUTORS, GIFT TO ONE OF.

TRUST ESTATE, DEVISE OF.

See "SOLE USE."

TRUST, EXPRESS.

See LIMITATIONS, STATUTE OF, 1.

TRUST, RESULTING.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

TRUST TO INVEST IN LAND OR GOVERNMENT SECURITIES.

See CONVERSION.

TRUSTEE.

See FORGERY.

TRUSTEE ACT, 1850.

1. After a bankruptcy, and the appointment of assignees, the proceedings were suspended under the 110th section of the Act of 1861, reserving the rights and jurisdiction of the assignees, and the Court:—

Held, that one of the assignees who had gone abroad was a trustee within the meaning of the *Trustee Act*, 1850. *In re Joyce's Estate.* 576

2. Sections 28, 34. *P.*, a trustee of copyholds, devised them to *S.*, who was not his customary heir and died. *S.* having disclaimed the devise, the Court of Chancery, upon the Petition of the *cestuis que trust*, which was not served upon the lord of the manor, made an order, under the *Trustee Act*, 1850, appointing *B.* trustee in the place of *P.*, and vesting in *B.* all the estate in the copyholds, which would have vested in *S.*, if *S.* had accepted the devise in *P.'s* will:—

Held, upon a Petition by the lord of the manor to discharge the order and rehear the former Petition, that the order was in the proper form, and was properly made without the consent of the lord of the manor, and did not prejudice the question whether he was entitled to a single or a double fine for *B.'s* admittance; and that the *cestuis que trust* were right in not serving their Petition upon the lord.

Semble, the lord was not entitled to a double fine. *Paterson* v. *Paterson.* 31

TRUSTEE, BONUS TO.

A trustee has no right to exact or charge any remuneration or bonus in respect of great advantages accrued to the *cestuis que trust* from services incident to the performance of the duties imposed by the deed of trust.

A settled account by a *cestui que trust*, allowing a bonus to the trustee, set aside. *Barrett* v. *Hartley*. 789

TRUSTEE RELIEF ACT, COSTS UNDER.

An assurance company, having received notice of conflicting claims to policy moneys, paid the moneys into Court under the *Trustee Relief Act* :—

Held, that the company were entitled to their costs of appearance as between solicitor and client; but not to any charges and expenses. *In re Webb's Policy*. 456

ULTRA VIRES.

See TRAFFIC AGREEMENT.

UNCERTAINTY.

See BLANKS IN WILL.

UNCLAIMED DIVIDENDS.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

UNOPENED MINES.

See MINES OPENED AND UNOPENED.

USER OF CHANCEL.

See CHANCEL.

VALIDITY, RIGHT TO QUESTION AFTER JUDGMENT AT LAW.

See PATENT, 1.

VARIANCE.

See PROSPECTUS AND MEMORANDUM, VARIANCE BETWEEN.

VENDOR AND PURCHASER.

See DISCOVERY, 2.
EASEMENT.
INTEREST.

VENDOR'S LIEN, AFTER WINDING UP.

See CONTRIBUTORY, 3.

VESTING.

Gift of residuary real and personal estate upon trust to sell and invest, and pay "the said property and interest arising therefrom to *A.*, on his attaining the age of twenty-four years; but in case of his not attaining that age, or leaving male issue, I give, devise, and bequeath the said properties" to other persons :—

Held, that *A.* took an absolute vested interest in the testator's residuary estate liable to be divested in the events mentioned in the will. *Whitter* v. *Bremridge*. 736

See DEATH BEFORE "ACTUALLY RECEIVING."
DEATH BEFORE "DUE AND PAYABLE."
DEATH BEFORE "PAID OR PAYABLE."
DEATH BEFORE "RECEIVING BENEFIT."
POWER, TRUST IMPLIED FROM.

VESTING ORDER FOR COPYHOLDS.

See TRUSTEE ACT, 1850, 2.

VOID LIMITATION USED FOR EXPLANATION.

See DEATH BEFORE "ACTUALLY RECEIVING."

VOLUNTARY WINDING-UP.

See SHAREHOLDER, PREPONDERATING INFLUENCE OF.

WAIVER OF SECURITY FOR COSTS.

See COSTS, SECURITY FOR.

WAY AND WATER, RIGHTS OF.

See EASEMENT.

WILL.

See ADEMPTION.
APPOINTMENT BY RESIDUARY GIFT.
BEQUEST, AVOIDED BY FRAUD.
BLANKS IN WILL.
CODICIL, WILL EXPLAINED BY.
CONVERSION.
CY PRÈS.
DEATH BEFORE "ACTUALLY RECEIVING."
DEATH BEFORE "DUE AND PAYABLE."
DEATH BEFORE "PAID OR PAYABLE."
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DEMONSTRATIVE LEGACY.
DEVISE "SUBJECT TO THE SAME CONDITIONS" AS OTHER SHARES WHICH WERE SETTLED.
DYING IN LIFE OF *A.* WITHOUT LEAVING ISSUE.
ELECTION BY HEIR.
ERASURE IN WILL.
EXECUTOR, GIFT TO, IN THAT CHARACTER.
EXECUTORS, GIFT TO ONE OF.
FARM.
GIFT BY A MOTHER TO CHILDREN, "LEGITIMATE OR OTHERWISE."
HEIRS OF BODY, READ NEXT OF KIN DESCENDED.
LEGACY, SPECIFIC OR DEMONSTRATIVE.
MAINTENANCE, GIFT OF INCOME FOR.
MARSHALLING.
PERSONAL ESTATE, BEQUEST OF.
PERSONALTY, LIMITATION OF, BY REFERENCE TO REALTY.
SEPARATE ESTATE.
SHELLEY'S CASE, RULE IN.
"SOLE USE."
SPECIFIC LEGACY.
"SURVIVE."
VESTING.

WILLS ACT.

See MARSHALLING.

Section 15.

See ERASURE IN WILL.

Section 24.

See SPECIFIC LEGACY.

WINDING-UP.

1. The misconduct of the directors and manager of a limited company, though it may be such as to render them liable if a suit were instituted against them by the shareholders, is not a ground on which the Court will consider it "just and equitable" to wind up the company under s. 79 of the *Companies Act*, 1862, where there is no evidence that their mismanagement has produced insolvency, or that the company is a mere bubble company, and where there is a reasonable prospect that, under proper management, it may be successfully carried on.

Where shareholders appear to resist a Petition for winding-up a company, they do so at their own costs; but where the Petition contains a personal charge against any director or any member of the company, the director or member so assailed is entitled to appear separately, and if the case against him fails, he is entitled to his costs. *In re Anglo-Greek Steam Company.* 1

2. The machinery of the Winding-up Acts is only applicable to companies where there are numerous shareholders.

Therefore in a company where there were only seven shareholders, and no debts, the Court dismissed a winding-up Petition with costs. *In re Sea and River Marine Insurance Company.* 545

3. When a company is being wound up under the *Joint Stock Companies Act*, 1856, the proper mode of recovering its assets in the hands of contributories is by a proceeding under the winding-up, and not by a suit.

The *A. Company*, a limited company, with all its shares fully paid up, sold its business and property to the *B.*

Company, and as part of the consideration, 950 shares in the *B. Company* were distributed among the shareholders of the *A. Company*. The *A. Company* was afterwards ordered to be wound up in the Court of Bankruptcy:—

Held, that the *A. Company* and its official liquidators could not maintain a suit in equity against the shareholders, who had been placed on the list of contributories, to have the 950 shares in the *B. Company* transferred to the official liquidators as assets of the *A. Company*.

One of the official liquidators, being the only creditor of the company, and having obtained the winding-up order after refusing a tender of more than the amount of his debt, as proved in the winding-up, was ordered to pay the costs of the suit. *Cardiff Preserved Coal and Coke Company* v. *Norton*. 558

See CONTRIBUTORY, 1—7.
EXECUTION AFTER WINDING-UP.
LIMITATIONS, STATUTE OF, 3.
PAID-UP SHAREHOLDER A CONTRIBUTORY.
PROMOTERS.
SHAREHOLDER, PREPONDERATING INFLUENCE OF.

WINDING-UP, COSTS IN.

See COSTS ON WINDING-UP PETITIONS, 1, 2.

WINDING-UP, TRANSFER AFTER.

See CONTRIBUTORY, 1, 2, 5.

WITNESS.

See PRODUCTION OF DOCUMENTS, 1.

WORDS.

See DEATH BEFORE "ACTUALLY RECEIVING."
DEATH BEFORE "DUE AND PAYABLE."
DEATH BEFORE "PAID AND PAYABLE."
DEATH BEFORE "RECEIVING BENEFIT."
DEVISE "SUBJECT TO THE SAME CONDITIONS" AS OTHER SHARES WHICH WERE SETTLED.
"HEIRS OF BODY," READ NEXT OF KIN DESCENDED.
PAID-UP SHAREHOLDER A "CONTRIBUTORY."
"PUBLIC HOUSE."
"SOLE USE."
"SURVIVE."

WORKS, CONTRACT FOR.

See CONTRACTOR'S PLANT, FORFEITURE OF.

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